Selected Social Issues in Programming: The Legal, Constitutional and Policy Implications of the Equality Provision in Bill C-20

by

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A research paper prepared for the Federal Task Force on Broadcasting Policy studying the Act to Amend the Canadian Radio - Television and Telecommunications Commission Act, the Broadcasting Act and the Radio Act

November 1985

TABLE OF CONTENTS

Chapter I	Introduction	1
Chapter II	Statutory and Regulatory Framework for CRTC Control of Broadcast Content: Implications of Bill C-20	6
	1) The Broadcasting Act	6
	2) The Broadcasting Regulations	15
	3) Informal Regulation: Policy Statements and CRTC Decisions	21
	4) Conclusion	30
Chapter III	Rationales for Content Regulation in Broadcasting	32
	1) Historical Perspective	32
	2) Rationales for Broadcast Regulation	60
	i) Spectrum Scarcity Doctrine	60
	ii) Canadian Culture and Unity Doctrine	71
	iii) Prior Grant Theory	75
	iv) Public Ownership Theory	76
	v) Impact and Privacy Theories	79
	vi) Conclusion	87
Chapter IV	The Proposed Amendments to the Broadcasting Act in Bill C-20: Constitutional and Policy Implications	90
	1) Charter Principles Generally	91
	2) Prohibition Against Abusive Programming	113

i) Prohibition Against Sexually Abusive Programming 135

ii) Prohibition Against Programming Abusive of Minorities Distinguished by Race, National or Ethnic Origin, Colour and Religion 140

3) Prohibition Against Minority Stereotyping 143

i) The Task Force on Sex-Role Stereotyping in Broadcasting and its Report "Images of Women" 144

i) Constitutional and Policy Implications of the Sex-Role Stereotyping Guidelines and other Forms of Minority Stereotyping Regulation 153

Chapter V Recommendations 173

Footnotes 182

0309M NF December 9, 1985

Chapter I Introduction

This paper will study the legal, constitutional and policy implications of sections 3 and 4 of Part II of An Act to Amend the Canadian Radio - Television and Telecommunications Commission Act, The Broadcasting Act and the Radio Act (Bill C-20). These sections propose to amend sections 3 and 16 of the Broadcasting Act[1] by, in effect, empowering the Canadian Radio-television and Telecommunications Commission (CRTC) to make regulations to ensure that programming respects and promotes the equality and dignity of all individuals, groups and classes of individuals regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A thumbnail sketch of this paper is in order at this point. Chapter II will explore the statutory and regulatory framework for CRTC control of broadcast content, in particular the relevant provisions of the Broadcasting Act and Regulations[2] and examples of informal CRTC regulation. An analysis of the context into which the amendments will be placed is critical to an understanding of how and to what extent they will affect the regulation of broadcast content by the Commission. Furthermore, the success of the CRTC in implementing the

amendments will depend largely upon the existing licensing system, the ability of the CRTC to impose license conditions and the general, overall regulatory framework in which the CRTC operates.

In Chapter III, I shall study the various traditional rationales for content regulation in broadcasting, focussing first, on the historical evolution of the broadcasting industry and the concurrently developing tension between regulatory objectives and the right to freedom of expression. I shall then examine and critically analyze each of the specific rationales used to justify broadcast content regulation and compare and contrast the situation in the print media.

Chapter IV will analyze the proposed amendments to sections 3 and 16 of the Broadcasting Act as found in Bill C-20. The focus will be on the constitutional and policy implications of the provisions insofar as they affect abusive programming and minority stereotyping in broadcasting. Any scheme for implementing the policy expressed in the proposed section 3(c.1) must be tested against the crucible of the freedom of expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms[3] (the Charter). Following an

examination of Charter principles generally, I will examine whether measures like the abusive programming regulation prima facie restrict the freedom and, if so, whether the restriction can be saved by section 1 of the Charter as reasonable, prescribed by law and demonstrably justified in a free and democratic society. Policy considerations are inextricably bound up in such an analysis. Cases like the CRTC censure of CKVU television[4], R. v. Keegstra[5] and Canadian Human Rights Commission v. John Ross Taylor[6] will be of particular assistance here. The individual categories of minorities in section 3(c.1) will be treated separately only insofar as they raise issues different from those pertinent to the general discussion.

Finally, I will discuss the possibilities for controlling non-abusive stereotyping using the sex-role stereotyping guidelines as a case study. Several important issues arise in this regard: How far should the CRTC go in its regulation, that is, how should the conflicting values of promoting equality in society and freedom of expression be balanced? How effective will regulation be in achieving the policies in section 3(c.1)? More particularly, how can standards be drawn in the regulations so as to balance conflicting values and

still fulfill policy goals? With regard to sex-role stereotyping, for example, should CRTC ban Lestoil commercials unless both men and women are shown scrubbing the floor or should the CRTC require an equal number of female voice-overs in television and radio advertising? Alternatively, should the CRTC limit regulation to abusive programming and leave non-abusive stereotyping to market forces? If general stereotyping is prohibited would features like Gone With the Wind, which portrays blacks in subservient positions, or Merchant of Venice, which portrays Jews as money-lenders, be banned? How can the CRTC prevent Nazi groups from lodging complaints against programs like The Holocaust under the national origin provision of section 3(c.1) on the ground that it shows Germans in a bad light? How feasible is it to require broadcasters to ascertain and program in response to minority needs along the lines of the Community Ascertainment program currently operating in the United States?

Finally, Chapter V will advance a number of specific recommendations with regard to whether the amendments should be adopted from a constitutional and public policy perspective and, if so, how they can best be implemented by way of regulation.

It should be noted that in many instances it will be instructive to draw comparisons with American broadcasting law and practice in view of the wealth of American jurisprudence and writing in the area and the many similarities between the Canadian and American broadcasting. At the same time, two jurisdictions have adopted different philosophies and motivations in certain areas. These provide interesting points for comparison and at times highlight the need for different solutions to common problems.

Chapter II Statutory and Regulatory Framework for CRTC Control of Broadcast Content: Implications of Bill C-20

1) The Broadcasting Act

Section 3 is the central statutory core for broadcast regulation in Canada. Although the section is entitled "Broadcasting Policy for Canada", it in fact enunciates general directives which govern the industry. For example section 16(1)(b)(ix) empowers the CRTC to make regulations "in furtherance of its objects". These objects are established in section 15 to be the regulation and supervision of the Canadian broadcasting system "with a view to implementing the broadcasting policy enunciated in s. 3". Similarly, section 17(1)(a)(i) empowers the Executive Committee of the CRTC, in consultation with the part-time members thereof, to grant licences subject to such conditions as it deems appropriate for the achievement of the policies set out in section 3. All the threads in the scheme of broadcast regulation therefore lead back to section 3.

Pursuant to section 3(c), the central premise of the system is the freedom of expression of the broadcaster and the right of the listener to receive programming, albeit subject to generally applicable statutes and regulations:

> 3. It is hereby declared that
>
> ...
>
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

Although the word "regulations" is not defined in the Act, it clearly includes those promulgated pursuant to section 16. Sections 1 and 2(b) of the Charter of Rights, which shall be discussed later in this paper, graft a new element onto section 3 of the Broadcasting Act. The generally applicable rules of limitation referred to therein must be, in the words of section 1, reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society.

The CRTC's basic tools are its regulation-making power in section 16 and its licensing power in section 17. Section 16 grants a very wide discretionary power to the CRTC to make regulations respecting, inter alia, standards of programs, the character of advertising, conditions for the operation of broadcasting stations as part of the network and for the broadcasting of network programs, and respecting other matters deemed necessary

for the furtherance of its objects. Section 17 empowers the Executive Committee of the CRTC, inter alia to issue, amend, renew and suspend licenses.

The extent to which the CRTC has the statutory jurisdiction to regulate specific program content is unclear. Section 3(d) provides that "the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing news on matters of public concern". Reading this together with sections 15 and 16(1)(b)(i), regulations designed to ensure fairness and a diversity of programming, a form of content regulation, would clearly be authorized. Such regulations would apply to the collective output of the "Canadian broadcasting system", that is, all the broadcasting undertakings in Canada[7], and thus would be intra vires the CRTC's statutory authority as being clearly in relation to the setting of standards for the entire industry. The latter part of section 3(d) provides that the programming of each broadcaster should be of "high standard". It is unclear whether this phrase empowers the CRTC to censor individual program content on an ad hoc basis or whether it is limited to promulgating an overall scheme of standards[8], enforced through the

licensing system and other means, which apply to the full range of programming of each broadcaster.

National Indian Brotherhood v. Pierre Juneau[9] is the only Canadian case[10] which touches on the point. The CRTC had refused to hold a public hearing in response to a complaint about a film entitled "The Taming of the Canadian West". The film was alleged to be "blatantly racist, historically inaccurate and slanderous to the Indian race and culture". Mr. Justice Walsh held that the decision to refuse to hold a hearing was within the CRTC's discretion:

> "Reading the Act as a whole..., I find it difficult to conclude that Parliament intended to or did give the Commission the authority to act as a censor of programs intended to be broadcast or televised. If this had been intended, surely provision would have been made somewhere in the Act giving the Commission authority to order our individual station or a network, as the case may be, to make changes in a program deemed by the Commission, after an inquiry, to be offensive or to refrain from broadcasting same. Instead of that, it appears that its only control over the nature of programs is by use of its power to revoke, suspend, or fail to renew the licence of the offending station".

Since there is no provision in the Broadcasting Act specifically empowering the CRTC to prohibit the broadcast of individual programs and, therefore, the CRTC had no jurisdiction to deal with the complaint, Mr. Justice Walsh

concluded that the Commission was entitled to decide that a hearing would not have furthered the public interest.[9]

The question remains open, after National Brotherhood as to whether post-facto censorship in the form of refusal to renew a license for showing a program of which the CRTC disapproves is within the CRTC's jurisdiction. I would argue that Mr. Justice Walsh's reasoning, as quoted in the above passage, applies to militate against such a result. He states that the CRTC may use licensing to regulate the "nature of programming", and not the content of particular programs. Nevertheless, the CRTC has on several occasions intervened in individual program content through its power to impose conditions of license and its power of license renewal.

Section 16(1)(b)(vi) of the Broadcasting Act grants the Commission wide powers with respect to

> prescribing the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs (emphasis added)

Pursuant to s. 17(1)(a) such conditions must be "related to the circumstances of the licensee". Section 3(c), however, provides that only "generally applicable statutes and regulations" may legally limit the unquestioned right

to freedom of expression. A condition which relates to the particular circumstances of the license is not a "generally applicable" statute or regulation. Even if "generally applicable" is not read so as to modify "regulation", a condition is not a regulation of any kind, particularly not under the Broadcasting Act which treats them separately. Therefore it would seem on a literal reading of the statute that license conditions cannot legally limit freedom of expression under section 3(c). However the Supreme Court of Canada's decision in CTV Television Network Ltd. v. CRTC[11] appears to modify that conclusion to a certain extent. In CTV, the Court upheld a condition which required CTV to broadcast twenty-six hours of original new Canadian drama in 1980-81 and thirty-nine hours in 1981-82. Although the condition stipulated the kind or category of programming to be broadcast, a form of content regulation, it did not dictate the content of the message to be conveyed. It is questionable whether this holding can be extended to license conditions dealing with specific message content as opposed to generic programming. My sense is that it cannot without a statutory amendment which goes beyond the terms even of the proposed section 3(c.1) to grant this power to the CRTC in ambiguous language. This is reinforced by s. 2(b)(?) of the Charter, which will

undoubtedly lead courts to interpret legislation which restricts freedom of expression in a narrow fashion. Thus after CTV the condition mechanism may be used to regulate diversity and Canadian content in order to implement the objectives of section 3(d) of the Broadcasting Act. However it is submitted that program-by-program content regulation by way of licensing conditions would not be permitted.

Thus while the Commission is endowed with sufficiently broad discretion to make licensing decisions on the basis of informal policy concerning such matters as diversity of programming and balance or fairness, the decision-making process must consider the full range of programming provided by public and private broadcasters in the Canadian system. For example, the CRTC could refuse a license-renewal application on the ground that the applicant's programming does not add to the variety of programming and multiciplicity of views provided by the system as a whole. A decision not to renew could also be made, for example, on the ground that a particular program or programs broadcast by an applicant are so biased as to create an imbalance that pervades its entire programming schedule contrary to section 3(d). It is submitted, however, that the Commission is not empowered to use its

licensing power to single out and censor individual programs for lack of diversity and balance. This very point was made by the CRTC in its "Air of Death" decision[12], opinion number 7, wherein it stated that:

> The Committee does not interpret the requirement for "balance" in the Broadcasting Act as a directive that every program must, of necessity, describe all sides of an issue, provided that in the context of total programming legitimately controversial issues are dealt with fairly and honestly.

For the reasons discussed above with respect to the CRTC's regulation-making authority, it is also submitted that the Commission has no statutory authority to make licensing decisions on the basis that a particular program or programs offend its policies concerning high standard unless the standards are so low as to affect the standard attributable to an applicant's entire range of programming. Several CRTC decisions discussed in Part 3 of this chapter have, in my view, been made without statutory authority for this reason.

The proposed amendments to sections 3 and 16 of the Broadcasting Act do not alter the statutory and regulatory framework for CRTC control of broadcast content except to formally define one aspect of the high standard criterion in s. 3(c). The sections provide as follows:

"3(c.1) the programming provided by the Canadian broadcasting system should respect and promote the equality and dignity of all individuals, groups or classes of individuals regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

16. (1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may

(b) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences of one or more classes,

"(i) respecting standards of programs for the purpose of giving effect to paragraph 3(c.1) and standards of programs and the allocation of broadcasting time for the purpose of giving effect to paragraph 3(d)."

Following the enactment of these amendments, the CRTC will have express authority to pass regulations to ensure or to make licensing decisions on the basis of programming which promotes the equality of minorities distinguishable by race, national or ethnic origin, colour, religion, sex, age or mental or physical handicap. In my view, that power can be read into the current provisions of the Act; the amendments merely make it more explicit. Certainly any regulations or licensing decisions made on the basis of section 3(c.1) will have to conform to the exigencies of sections 1 and 2(b) of the Charter. Moreover, the foregoing analysis of the

Commission's jurisdictional authority to control content on a program-by-program basis remains unchanged. It is submitted that the Commission will have no greater power to censor individual programs which violate the equality standard set out in section 3(c.1) or in any regulations enacted pursuant thereto than it does under s. 3(c). Rather, the CRTC must look to the full range of programming provided by each broadcaster when evaluating any aspect of a licensee's fulfillment of the high standard requirement.

2) The Broadcasting Regulations

It is useful now to examine the regulations dealing with programming content which have already been passed under the authority of section 3(c) of the Broadcasting Act. The most important one for the purposes of this paper deals directly with content and is found in part one of the section entitled "Broadcasting Generally" in the broadcasting regulations for A.M. and F.M. radio and television. As originally enacted, it read in part as follows:

> (1) No station or network operator shall broadcast
>
> (a) anything contrary to law;
>
> (b) any abusive comment on any race or religion;[13]
>
> (e) any obscene, indecent or profane language;[14]
>
> ...

This regulation has since been amended in part to prohibit:

> (b) any abusive comment that, when taken in context tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability[15]

Both the old and new regulation clearly purport to regulate programming and advertising content. It is arguable for the reasons previously given that this regulation, to the extent that it gives the CRTC jurisdiction to deal with individual programs, is invalid. On this view, the CRTC may only judge a broadcaster's overall programming. Thus it may determine whether a particular program is so abusive as to taint the entire range of a programmer's fare or whether it is counter-balanced by another program which sends a remedial message. However, it cannot assess the program in isolation. The contrary view is that the regulation is valid even on a program-by-program basis. If this latter view is correct, and I believe for the reasons previously stated it is not, it is instructive, for the purposes of this paper, to examine the entire regulation in its past and present form with the proposed section 3(c.1) in mind. I shall assume for the balance of this paper that the regulation is valid on the basis that, if it is not,

it can be easily remedied by a further statutory amendment to the Broadcasting Act.

The prohibition in paragraph (1)(a) of the regulation against broadcasts contrary to law contemplates matters such as libel[16], Criminal Code provisions respecting obscenity[17], hate propaganda[18], defamatory libel[19], sedition[20], blasphemy[21], as well as human rights legislation.[22] It would seem at first glance that programming which violates the equality standard in section 3(c.1) might already be caught by sub-section 1(a) of the regulations.

For example, programming which fails to promote the equality and dignity of women because it is obscene within the meaning of section 159(8) of the Criminal Code is already prohibited under subsection 1(a) of the regulations. The Criminal Code definition does not, however, cover sex-role stereotyping simpliciter.

"Hate propaganda" in section 281.2(2) of the Criminal Code encompasses the willful promotion of hatred against an identifiable group and includes oral statements communicated by broadcasting.[23] "Identifiable group" is defined as "any section of the public distinguished by

colour, race, religion or ethnic origin".[24] Groups distinguished by age, sex or mental or physical handicap are not included.

As to defamatory libel, section 262(2) states it may be expressed either in written words or by an object. Section 263 provides that a libel is published when exhibited, read, seen, shown or delivered. Thus it seems a defamatory libel that even if it could be said to apply to groups as opposed to individuals,[25] must be seen and not merely heard. A radio broadcast would therefore be excluded.

Finally, human rights legislation is inapplicable in the broadcasting context. Section 13(2) of the Canadian Human Rights Act,[26] expressly excludes broadcasting from the discriminatory practice provision in section 13(1). The Ontario Human Rights Code[27] is concerned only with services, accommodation, employment, vocational associations and contracts. Discriminatory expression is not an offence.[28]

In conclusion, only extreme examples of inequality against minority groups like obscene publications or hate propaganda are already prohibited by

the subsection 1(a) of the broadcasting regulations. It remains to examine subsection (1)(b) and (c). I shall look first at subsection (1)(c).

Subsection (1)(c) prohibits obscene, indecent or profane language or pictoral presentation.[29] The provision appears to be directed to the profanity of the individual words used rather than to character of the message conveyed. This view is buttressed by the fact that subsection (1)(c) specifically uses the word "language" while subsection (1)(b), in contrast, uses "comment". Nevertheless, to the extent that programming violates the dignity of minority groups through the use of obscene, indecent or profane language and images, it is prohibited by the regulations.

Originally, subsection (1)(b) of the regulations prohibited broadcasting abusive of any race or religion, but omitted several other group classifications, including sex, from the listed categories.[30] However, on October 2, 1984, the CRTC enacted an amendment specifically prohibiting comments which are abusive of the same minority classifications as those found in s. 3(c.1). In my view, this sub-section of the regulations was statutorally authorized by the high standard requirement

in section 3(c). The proposed amendment merely clarifies and refines the CRTC's jurisdiction to protect minorities. For example, these regulations deal only with the far end of the spectrum of discriminatory spectrum, with illegal behaviour such as the publication of obscenity or hate propaganda and abusive comments. Section 3(c.1) makes it clear that more subtle forms of discrimination such as sex-role stereotyping may legally be regulated against, as well.

It should be noted that although there are several detailed provisions in the regulations regarding advertising content, such as the alcoholic beverage advertising regulation, none deal specifically with the promotion or equality among minority groups. These aspects of advertising are governed by the general regulations discussed above.

The penalty for any violation of the broadcasting regulations is a maximum fine of $25,000 for a first offence and a maximum of $50,000 for each subsequent offence under section 29(1) of the Broadcasting Act. A licensee who repeatedly violates the regulations risks the possibility the Commission will refuse future applications

for a renewal of license on the ground that his programming is not of sufficiently high standard.

3) Informal Regulation: Policy Statements and CRTC Decisions

As previously discussed, the CRTC uses its licensing power in section 17 and the threat of non-renewal as a basic regulatory tool. This power constitutes a powerful economic club. Given the broad licensing discretion reposed in the CRTC by section 17, it is important to examine the various CRTC policy statements and decisions in relation to broadcast censorship. In some cases, the CRTC has, in my view, exceeded its jurisdiction for the reasons discussed in the first part of this chapter.

The most important statement of policy is found in the White Paper on Political and Controversial Broadcasting Policies.[31] Although the document was formulated by the Board of Broadcast Governors, the predecessor to the CRTC, it was expressly adopted by former CRTC chairman Pierre Juneau at a speech given to the Canadian Association of Broadcasters (CAB) in May, 1972.[32] As a practical matter, the White Paper carries the same weight as positive regulation in view of the Commission's discretion over licensing and license

renewals.[33] The threat of non-renewal constitutes a powerful incentive for broadcasters to comply with the White Paper guidelines notwithstanding that they lack formal legal force.

The White Paper addresses the issue of fairness in broadcasting, now codified as a requirement of section 3(c) of the Broadcasting Act that the Canadian broadcasting system provide reasonable, balanced opportunity for the expression of differing views on matters of public concern. As will be discussed later on in this paper, the White Paper directives can also be used to further the equality principle expressed in the proposed section 3(c.1).

It begins with the self-contradictory assertions that the Board does not exercise censorship, but that program content must confirm to its regulations:

> The Board does not exercise censorship. It does not restrict the nature of material to be broadcast, except that such material must conform with its printed regulations. (emphasis added)

The White Paper then lists four principles of the basis of BBG policy with respect to controversial broadcasting:

1. The air belongs to the people, who are entitled to hear the principal points of view on all questions of importance.

2. The air must not fall under the control of any individual or groups influenced by reason of their wealth or special position.

3. The right to answer is inherent in the doctrine of free speech.

4. The full interchange of opinion is one of the principal safeguards of free institutions.

These four principles reflect the Board's (now the CRTC's) view that the right of free speech belongs to the public, not the individual licensee. Because the airwaves are a public resource available to only a few, those with access are in a position of public trust and must present all main points of view on controversial matters.[34]

Although, BBG declined to lay down specific rulings on controversial broadcasting, it set forth the following general guidelines:

(a) Forthright discussion of all controversial questions;

(b) Equal and fair presentation of all main points of view;

(c) The discussion of current affairs and problems by informed authorities and competent speakers.

Part III of the White Paper, entitled "Rulings", sets out further directives regarding the right of reply to controversial programming.

> III. Rulings
>
> ...any station wishing to broadcast controversial material, whether as a program or as a station editorial, may do so, subject only to the condition that persons desiring to express views contrary to those contained in the controversial program or editorial must be given an opportunity to do so. If, however, no person comes forward to make use of the facilities which are offered, the station is not bound to seek out persons holding contrary views. Nevertheless, the station should ensure that, in the broadcast of controversial material or editorials, persons having a different view will be given an opportunity to express that view over the station, and that advice of this fact is presented to the public at the time of the original broadcast. Stations may comply with this ruling by reading without comment, representative letters written by those holding opposite views.

All controversial broadcasts are subject to the Regulations.

The CRTC has put these policies into practice. For example, it held a public hearing in March of 1969 into the CBC documentary on environmental pollution in Ontario, entitled "Air of Death". The Commission's goal was to develop standards for public informational programming, particularly controversial broadcasting. In

its report following the hearing, the CRTC issued explicit production guidelines to ensure fairness and a balanced opportunity for the expression of differing views on matters of concern.[35] These guidelines were designed to create industry-wide standards for this kind of programming and are therefore within the Commission's statutory authority under section 3(c).

The Commission censured a broadcaster for the first time for failing to meet the required standards of fairness in March, 1972.[36] The CHNS case concerned an editorial which amounted to a personal attack on the Miles for Millions organization. The CRTC held that the station should have provided the organization with equitable air time for the purposes of reply together with an advance copy of the editorial and a notice of the times it was to be aired.[37] Because this was the first such incident to come before the Commission, the CRTC promised not to consider the matter at license renewal. However, the CRTC made it clear that it would consider the licensee's future course of conduct with interest.

This form of regulation is not directed at the content of particular messages. It simply provides that, whatever the message, the other side must be allowed to

reply. The concern from a constitutional and public policy perspective is that there are no stipulated standards of conduct either in the form of regulations or judicial commentary. CHNS was censored for violating vague general principles. This may have an inhibiting effect on a broadcaster's future conduct.

It should be noted that the CRTC has exercised content control in the past which is not restricted to ensuring fairness. On May 27, 1964, its predecessor, the BBG, directed radi stations to confine talk show discussions on sexual topics to late evening hours.[38] The CRTC warned CHOM-FM at its license renewal hearing about what the Commission perceived to be offensive language,[39] and issued another warning to CITY-TV that some of its programming, in the form of pornographic movies, violated its promise of performance.[40] The CRTC also issued guidelines for partisan broadcasting in the context of the Commission's decision to renew CFCF's license following its compaign against Bill 22[41] in Quebec.

A very significant example of informal content regulation in the equality context is the 1983 decision by the CRTC in the CKVU Television case.[42] Western

Approaches Limited, a licensee of CKVU Television, broadcast an editorial on May 12, 1983 which stated, inter alia:

> If there is ever another conventional war, it's my hope that Media Watch and its army of snoops will be found in the front line where they can be raped by the Russians.

Media Watch, an organization which monitors sex-role stereotyping on radio and television, subsequently filed a complaint with the Canadian Radio-Television and Telecommunications Commission (CRTC) alleging that the statement constituted an incitement to hatred and violence against women in general and the members of Media Watch in particular. The CRTC issued a formal censure against CKVU, declaring that the Commission would monitor CKVU's programming in the future for sex-role stereotyping and other similar abuses. Licensees were reminded that the standard of their programming and their acceptance of responsibility for that programming are considered by the Commission at license renewal time.

The chief rationale of the decision is that freedom of expression is not absolute. It is limited by laws which protect countervailing interests. The Broadcasting Act imposes a trust on licensees to operate in the public interest. CKVU violated this trust, in the

Commission's eyes, by broadcasting a program which advocated sexual violence against an identifiable group at a time when the broadcasting industry (the CBC, the Canadian Advertising Advisory Board (CAAB), and the Canadian Association of Broadcasters (CAB)) had recently committed itself to self-regulation in accordance with the recommendations of the Task Force on Sex-Role Stereotyping.[43] It should be noted that the CKVU decision was issued before the CRTC has amended the broadcasting regulations to prohibit inter alia, sexually abusive programming. The amendment would likely cover the situation today. The Commission professed to be aware of the dangers of censorship and over-regulation, but concluded that the public's right to receive programming of a high standard outweighed CKVU's editorial expression interest in the circumstances. Unfortunately, the CRTC did not explain how it weighed the consequences of censorship against the harm caused by this type of broadcast.

According to the CRTC, the case was not merely one of unbalanced programming which could be "cured" by offering Media Watch members a right to reply because the issue of whether or not women should be raped is beyond debate. This seems to be a non sequitur unless one

accepts the proposition that matters which the CRTC considers to be beyond debate may be excluded from the public domain for that reason alone. The danger inherent in such a proposition is that many matters which seem obvious today may be reconsidered tomorrow in light of scientific developments, changing social mores, and so on. It may be, however, that underlying the Commission's assertion that the issue of rape is beyond debate was the notion that the program should be censured because it was abusive. The issue of abusive programming is discussed further on in this paper.

Nevertheless, the Commission used its licensing power effectively to censor programming characterized by sex-role stereotyping on the basis of the high standard coiterion in section 3(c). In my view this action was invalid and would not be any more legitimate under the authority of the proposed section 3(c.1). It is submitted that the CRTC has jurisdiction when making licensing decisions to consider a broadcaster's entire record with respect to sex-role stereotyping, but not to single out individual programs or to create a prior ban on all sex-role stereotyping in broadcasting.

Furthermore, this kind of informal censorship through voluntary guidelines and CRTC censure arguably

violates section 3(c) of the Broadcasting Act which provides that right to freedom of expression is subject only to "generally applicable statutes and regulations" (emphasis added). Finally, informal regulation, in this manner, avoids even the nominal scrutiny provided by the Clerk of the Privy Council pursuant to s. 3 of the Statutory Instruments Act.[44] The Clerk of the Privy Council in consultation with the Deputy Minister of Justice must examine all regulations passed by any regulation making authority to determine that:

> (a) it is authorized by the statute pursuant to which it is made;
>
> (b) it does not constitute an unusual or unexpected use of authority;
>
> (c) it does not trespass unduly on existing rights and freedoms, and is not inconsistent with the Canadian Bill of Rights.

4) Conclusion

In my view, the statutory and regulatory framework for CRTC control of broadcast content will not be substantially changed if section 3(c.1) is enacted into law. The proposed amendment particularizes one aspect of the high standard requirement presently found in section 3(c); that is, the obligation of broadcasters to promote the equality and dignity of certain minority groups in society. However, the power of the CRTC to carry out

these objectives whether by passing regulations, imposing conditions of license or in exercising its discretion to grant, renew or suspend licenses would still, it is submitted, be subject to the present restrictions on program censorship. In all cases, any form of content control can only be a way of creating standards applicable industry wide and which do not purport to authorize individual program censorship or a prior ban on certain kinds of expression. The full range of programming provided by the Canadian broadcasting system or by each licensee must be considered in any CRTC determination of whether standards requirements have been met. The extent to which any measures to control broadcast content are constitutional in light of the Charter will be discussed later in this paper.

Chapter III Rationales for Content Regulation in Broadcasting

Any discussion of the constitutional implications of the proposed amendment to the Broadcasting Act in section 3(c.1) should be preceded by a constitutional analysis of content regulation in the broadcasting context generally. By analyzing the evolution of broadcasting in the United States and Canada and the different impetuses which fueled its development in both jurisdictions, it will be possible to assess the rationales traditionally used to justify a restriction of freedom of expression in this area of communications.

1) Historical Perspective

Broadcasting has had, traditionally, a special relationship with the fundamental liberty of freedom of expression. Unlike the printed media of communication the electronic media have not been accorded full protection from government interference. This equivocal status has its origins in the technological and regulatory evolution of the broadcasting industry. The development of the broadcasting industries in Canada and the United States will be traced and the contrasting evolutionary patterns will be related to the different rationales used to support broadcast regulation in the two countries. It is

important to grasp the different emphasis placed upon the various rationales in Canada and the United States in order to analyze properly the constitutionality of any Canadian attempt to regulate broadcast content.

In the United States,[45] licensing was first instituted as a means to control interference from amateur use of radio which threatened navigational safety. Congress enacted the Wireless Ship Act of June 24, 1910[46] governing shipping communications, followed by the Radio Communications Act of 1912[47] which prohibited the operation of radio apparatus without a license from the Secretary of Commerce and Labour, reserved certain frequencies for government use and regulated, inter alia, the character of wave emissions and the transmission of distress signals.

Following World War I, which accelerated the development of radio communications, the first commercial broadcast stations were established. The rapid proliferation of these stations caused the Secretary of Commerce and Labour in 1921 to license all broadcasting stations to operate at one of two assigned frequencies.[48] However the situation became chaotic as multiplying stations began to crowd the airwaves creating

"a virtual cacophony of voices".[49] In order to relieve congestion, the Secretary established a third broadcast wavelength[50] and attempted to limit the number of licenses issued. This action was held to exceed his authority, however, by the Circuit Court for the District of Columbia in Hoover v. Intercity Radio Corp.[51] On the recommendation of the National Radio Conferences of 1923 and 1924, the Secretary then established a radio spectrum, assigning specified frequencies to individual stations[52] and regulating the power and time of the broadcasts so that several stations could occupy one channel. Once again, the regulations were struck down. The Illinois District Court in U.S. v. Zenith Radio Corp.[53] held that the Secretary had no power to regulate the frequency, power and hours of operation of broadcast stations.

Chaos followed. Stations operated at whatever frequency or power levels they chose, at any time of day. Finally, on the advice of the National Radio Conference of 1925, Congress enacted the Radio Act of 1927[54]. The Radio Act established the Federal Radio Commission (FRC) with authority to assign wavelengths, regulate station power and hours of operation. Most importantly, it had jurisdiction to issue, renew and modify broadcast licenses according to a standard based upon the "public interest,

convenience, or necessity". The Communications Act of 1934[55] replaced the Radio Act and substituted the Federal Communications Commission (FCC) for the FRC, but it otherwise replicated most of the provisions of the 1927 statute and retained the "public interest" standard.

The licensing scheme established by the Communications Act was upheld in 1943 by the United States Supreme Court in NBC v. U.S.[56] In obiter, the Supreme Court held that the FCC's decision to grant, renew or revoke a licence based on a public interest standard was not a denial of free speech[57] as guaranteed by the First Amendment to the the U.S. Constitution. This accords with Article 10 of The European Convention on Human Rights which recognizes that the right to freedom of expression does not conflict with the licensing of broadcasting or cinema enterprises.[58]

What began as a means of "traffic control" to prevent the congestion of a limited number of airwaves eventually evolved into a power over the message itself. As stated by Mr. Justice Frankfurter in the NBC case:

> "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are

> asked to regard the Commission as a kind of traffic officer, policing the wavelengths to prevent stations from interferring with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.[59]

Although the 1927 Act specifically withheld censorship power from the FRC because it interfered with the right of free speech,[60] the so-called public interest criterion[61] for the selection of prospective licensees has become over the years a vehicle for significant government control of broadcast content.[62]

I propose now to outline briefly two important manifestations of the public interest standard which have fostered government control of broadcast content in the United States. Formal regulation of content in the United States has been implemented through the use of two policies: the Fairness Doctrine and the Community Ascertainment Program. These two policies are of particular importance to this paper as methods of regulating broadcasting content in Canada. In Chapter IV, they are examined again as possible solutions to the particular problem of equality in broadcasting.

The Fairness Doctrine evolved out of the public interest standard in a series of early FCC decisions[63] which were finally consolidated in the 1949 FCC Report on Editorializing by Broadcast Licensees.[64] In a 1959 amendment to the Act of 1934,[65] the U.S. Congress codified the basic outlines of the doctrine as it exists today. Essentially, broadcasters are obliged "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[66] Two basic requirements have been read into this section: first, that a reasonable time be devoted to the discussion of controversial issues of public importance, and second, that reasonable opportunity be afforded for the presentation of contrasting views on those issues covered.[67] It should be noted that this requirement applies not to individual programs, but rather to the overall pattern of programming.[68]

The United States Supreme Court in the Red Lion case confirmed that the 1959 Amendment incorporated the Fairness Doctrine into the Communications Act,[69] and upheld the constitutionality of the doctrine under the public interest standard as enunciated in the Communication Act and under the public's First Amendment

right to free and open debate. In so doing, the Court relied upon the scarcity doctrine and the prior grant theory, discussed later in this chapter, to distinguish broadcasting from the print press with respect to the need for government regulation[70].

Red Lion was specifically concerned with the personal attack and political editorializing rules, promulgated in 1967,[71] since the case involved an attack by a broadcaster on the writer of a political book about Goldwater and the refusal of that broadcaster to grant the author an opportunity to reply on the air. Nevertheless, the decision is written broadly enough to support not only the requirement that opposing views be presented, but also that reasonable time be devoted to the discussion of important controversial issues, in the first place.[72]

Pursuant to the personal attack rules, a licensee must forward to the person or group attacked, no later than one week after the broadcast, a script, tape or summary thereof, along with "an offer of a reasonable opportunity to respond over the licensee's facilities". The same steps must be taken within twenty-four hours by a licensee who has endorsed or attacked a political candidate. There are a number of related principles which

have developed over the years in order to clarify the application of the personal attack rules. For example, a licensee who presents only one viewpoint must actively encourage the presentation of opposing views.[73] It should be noted, however, that not all the viewpoints on a given issue must be presented as long as there has been a representative sampling of opinions by the broadcaster.[74] In some cases, the broadcaster may fulfill his responsibility simply by inviting the public to request response time or even by providing the contrasting opinion himself. Since there is no person or group entitled by right to present opposing views, the broadcaster may reject a particular response request as inappropriate.[75] Nevertheless in the absence of a suitable volunteer, the broadcaster must approach a known spokesman for the opposing side.[76] If such spokesman declines, the licensee need not take further steps. Finally, the broadcaster's duty to air contrary views must be discharged at his own expense, if necessary.[77]

In all cases, the licensee has discretion to determine the issues and viewpoints to be covered, the amount of time[78] to be allocated thereto, the format in which various viewpoints should be presented, and the spokesmen to be selected for those viewpoints.[79] The

standard is one of reasonableness and good faith;[80] the FCC will not substitute its judgment for that of the broadcaster.[81] Breach of the fairness rules will usually be remedied by an order compelling the presentation of opposing views,[82] although the Commission has the authority to deny applications for license renewal[83] or even to revoke a license for failure to comply.[84]

The main question is how far the fairness doctrine may be extended, specifically whether it applies not just to news programs, documentaries and editorials, but whether it also applies to commercial advertising and entertainment programming. The answer depends upon whether the latter types of broadcast can be said to raise a controversial issue of public importance. This is, obviously, not as easily determined as in the case of a direct attack on an individual or group in an editorial or newscast.

The FCC, in a landmark decision, applied the fairness doctrine to cigarette commercials which implicitly promoted the view that smoking is desirable. It held that in light of government studies proving the adverse health effects of smoking, this was a

controversial issue of public importance which generated an obligation to present the opposing view.[85] This decision was upheld in Banzhaf v. FCC.[86] When the FCC declined to apply the doctrine to automobile and gasoline advertisements, the United States Court of Appeal for the District of Columbia[87] held that these commercials encouraged viewers to drive large cars which contribute to environment pollution and that there was no reasonable basis for distinguishing these commercials from those involving other hazardous products such as cigarettes. Therefore, the broadcaster had an obligation to discuss the view that automobiles cause air pollution. The Court went even further in Retail Store Employees Union, Local 880 R.C.I.A. v. FCC[88] in which striking store employees tried to organize a store boycott through advertising in reply to commercials for the store. In remanding the case to the FCC for further proceedings, the Court indicated that the Commission had failed to consider whether congressional policy favouring the equalization of bargaining power between labour and management raised a controversial issue to which the fairness doctrine applied. The Court, therefore, implied that the test of a controversial and important issue is whether it generally involves an already established national policy of importance.[89]

The effect of these decisions would have been to extend the fairness doctrine to the point of undermining the entire commercial broadcasting system. As a result, the FCC, in 1974, decided not to apply the fairness doctrine to commercials other than those which explicitly advocate a particular position rather than present a point of view which is implicit in and incidental to the broadcast message.[90] There has not, as yet, been any attempt to apply the doctrine to pure entertainment programming.

The Ascertainment Program, which was first established in 1971,[91] is an attempt by the FCC to ensure that broadcasters respond to the interests of significant groups within their community. The following discussion will be of particular interest in the last chapter when various means of implementing the policy objects in the proposed section 3(c.1) of the Broadcasting Act are considered. Programming must therefore address local issues and provide information of practical use to area residents. In addition, broadcasters have a particular obligation toward minorities within the community. As early as 1946, the FCC expressed the policy that American broadcasting "serve significant minorities among our population, and the less dominant needs and

tastes which most listeners have from time to time".[92] Although the Report was concerned mainly with minority preferences in programming, the word "minority" later came to include reference to minority racial and ethnic groups.[93] Minority programming must not only serve the special needs of the minority community, but also educate the non-minority audience. The objectives of minority programming have been divided into two classes: first, representational objectives such as presenting minority viewpoints, responding to problems unique to the particular minority and fostering awareness on the part of all viewers of the minority's existence, and second, political objectives such as combatting discrimination by eliminating negative portrayals of minorities in the media.[94]

Broadcaster licensees must follow five procedures in order to demonstrate to the Commission that they have programmed in response to community needs. These procedures consist of listing the demographics of the licensee's city of license, conducting interviews with community leaders in accordance with an FCC checklist of community elements, conducting a general public survey to determine community needs, problems and interests, compiling an annual list of no more than ten significant

problems and needs within the service area with particular attention to minority concerns, and, finally, programming in response to those significant problems."[5]

In practice, this process is fraught with problems. First, the annual community problems lists submitted by licensees are invariably too general to address particular group concerns effectively."[6] Virtually all public affairs programming can be fitted within one of the ten categories, eliminating the necessity of creating special programs. Second, the FCC has not clearly defined what constitutes "responsive" programming, particularly when various minority interests conflict, leaving that judgment largely to the discretion of the individual licensee."[7] For this purpose, the FCC does not distinguish between programs which are targeted to confront directly minority problems and programs in which minority issues are touched upon tangentially, in another context altogether. As a result, programming may be only nominally responsive. Moreover the Commission has noted that minority needs can be secured not just by specifically devised programming, but also by programs of general interest."[8] Finally, licensees can frustrate Ascertainment objectives entirely by scheduling programs at odd hours so as not to interfere with the lucrative entertainment programming schedule, thereby rendering the

minority programs ineffective. By refusing to interfere with the exercise of the broad- caster's discretion in this area, the FCC has succeeded in avoiding defeat of the Ascertainment Program on First Amendment grounds.

It should be noted that with the deregulation of radio by the FCC in 1981,[99] broadcasters are no longer required to conduct the demographic or public surveys and to interview community leaders, although they must continue to list annually five to ten community issues and include examples of responsive programming to be placed in the station's public files. Most importantly, licensees, in choosing which issues to address, may take into account the programming of other stations in the same market and the existence of other stations which might reasonably be relied upon to address such issues. This particular change effectively places the burden of addressing minority issues on stations already serving minority audiences.[100] Thus, both the representational and political objectives of the Ascertainment Program are defeated at least in the context of radio. The Ascertainment rules discussed above, however, are still applicable in their entirety to television broadcasting.[101]

It is clear from the foregoing discussion that the public interest standard has evolved as an effective tool for government control of broadcast content. Although the constitutionality of a licensing scheme based on this standard has never been directly challenged, its parameters have come increasingly under attack. I discuss below the rationales for permitting content regulation in the name of the "public interest" and their continuing viability in the face of technological change.

In Canada, while some of the problems discussed in the American context have arisen as a practical or technical matter, the development of the broadcasting industry was fueled by a very different impetus. The Wireless Telegraph Act of 1905,[102] later incorporated into the Telegraphs Act of 1906,[103] required that licences be obtained for the operation of or use of radio apparatus in connection with wireless telegraph stations. The Department of Marine and Fisheries regulated broadcasting from 1919 to 1932, and issued the first Canadian broadcasting licence to the Canadian Marconi Company of Canada Ltd. As in the United States, frequencies were largely unsupervised in this particular period. Again, chaos resulted.

Broadcasting was dominated during this period by private commercial enterprises which relied largely on American programming. One exception was the Canadian National Railways (CNR) which, in 1923, set up a broadcasting system for the benefit of its passengers. This was part of CNR's marketing strategy in its competition against Canadian Pacific Railway, rather than as a result of government policy.[104] CNR's programming, however, reflected a concern about broadcasting as a public service and a means of national unification. It included opera, symphony and even a dramatic series based on Canadian history. This was the first indication of the direction that broadcasting would take in Canada.

The chaotic state of the industry led to the appointment of the Aird Commission on December 6, 1928, the first Royal Commission on Broadcasting. Its purpose was to determine how radio broadcasting could best serve the interests of Canadian listeners and the national interest of Canada. The Commission concluded that broadcasting had great potential for fostering national consciousness and Canadian culture, and that therefore it should be structured as a national public service. This national unity concept has been and still remains fundamental to government policy regarding broadcast

regulation. The problem, from the Commission's perspective, was that private stations were basically concerned with commercial success, rather than with fulfilling a larger public interest, and the former could most easily and cheaply be achieved by importing American programming. The fear, even in those early years, was that broadcasting would serve as a vehicle for American cultural domination[105] if left to market forces. The Commission recommended that radio be nationalized with the creation of a publicly owned corporation similar to the British Broadcasting Corporation.

Parliament ultimately refused to go that far. It established a special Parliamentary committee to evaluate the Aird Report and, on that committee's recommendation, adopted a compromise position[106] with the passage of The Canadian Radio Broadcasting Act[107] in May 1932. The Act established the Canadian Radio Broadcasting Commission (CRBC) to both regulate and engage itself in broadcasting, exclusively under government funding.

Various problems developed, both with respect to the CRBC's too many disparate and competing roles, and its lack of independence from Parliament. In response, the Canadian Broadcasting Act was passed in 1936. It created

the Canadian Broadcasting Corporation (CBC) as an independent Crown corporation. Pursuant to the Act, the government had the ultimate authority over the licensing of private stations, but was to act on the recommendation of the CBC. The CBC was granted significant regulatory powers over broadcast programming and advertising in the private sector, in addition to increased autonomy over its own operation. The CBC therefore retained the dual role of running its own network and over-seeing private interests. Management of the operations of the CBC was delegated to a General Manager and Assistant, and broadcast policy, that is, the development of a national broadcasting system and the supervision of both the public and private sectors of the industry, was overseen by the CBC Board of Governors.

The basic governmental policy in Canada was thus to develop a national broadcasting network to unify the country.[108] The emphasis was consequently on the public system, with private broadcasters playing an ancillary role. Because the system was geared to the creation of a national network which would operate as a public service, there was less need than in the United States to impose specified standards on the private sector. Thus, while the CBC Board of Governors released a policy statement in

1939 stating that private broadcasters had a responsibility to offer a "fair opportunity for the presentation of principal points of view on issues of public concern,"[109] it did not impose a formal public interest standard which existed in the United States. Rather, the Canadian broadcasting regulations were, and in fact still are, more concerned with Canadian content rules to protect the system from American cultural domination.

The initial policy of having a predominant public network in the form of the CBC, with private broadcasters performing an ancillary role, did not succeed. Due to a confluence of factors, including a lack of strong supervision by the CBC over private broadcasters, the use by the CBC of private broadcasters to distribute its own programming, and the private sector's commercial success, the private sector grew to be an integral and vital part of the Canadian broadcasting system.[110] It therefore began lobbying for legislation which would recognize this state of affairs through the creation of a regulatory authority independent of the CBC.

The process of change was slow. The private sector's lobbying first resulted in the appointment of the Massey Commission in 1949 to study the question. The

Commission, however, favoured the continued predominance of the national network. It recommended that the private sector be limited to completing the national network and providing local service. Further, it recommended that the CBC be granted a monopoly over television, and that private broadcasters simply be licensed as CBC affiliates. This recommendation was followed by the government when television broadcasting in Canada began in September 1952.

It was not until 1957 that the Fowler Commission, formed in 1955 in fulfillment of another Massey Commission recommendation, acknowledged for the first time that private broadcasters were an integral and permanent part of the system. The Fowler Commission recommended that an independent regulatory agency, the Board of Broadcast Governors (BBG) be established. The BBG would manage the CBC and supervise its broadcasting operation. As well, it would be given supervisory jurisdiction over the Canadian broadcasting system as a whole. The Ministry of Transport would retain its licensing powers, notwithstanding that licensing applications would be heard by the BBG, and would rule on technical aspects of licensing applications while receiving the BBG's advice on economic and social issues.

The Broadcasting Act promulgated by Parliament in 1958 adopted most of the Fowler Commission's recommendations, but created separate boards for the CBC and the BBG. The BBG was granted supervisory authority over the system as a whole, including the CBC. The 1958 Act further authorized the creation of a second television network, the CTV, to be comprised of private stations. The private broadcasters were now, through the CTV, full-fledged competitors on an equal footing with the CBC.

In 1968, the current Broadcasting Act[111] was enacted, creating the Canadian Radio-Television Commission to succeed the BBG. The Act endowed this agency with greater regulatory powers than those enjoyed by the BBG, such as direct licensing authority without reference to the Ministry of Transport, and continued the principle established by the 1958 Act of removing supervisory authority over the system from the CBC. A 1976 revision[112] to the 1968 Act, replaced the Canadian Radio-Television Commission with the Canadian Radio-Television and Telecommunications Commission (CRTC).

Although there is no formal statutory or regulatory requirement equivalent to the American fairness doctrine, the principle of fairness is firmly entrenched

in the Canadian system. As previously noted, the need for balanced programming was recognized as early as 1939 by the CBC Board of Governors who released the following policy statement:

> The CBC, in both political and in other controversial matters of public interest and concern, has always taken the view that in holding a broadcasting licence the station assumes wider general responsibilites than those specifically required by the regulations... The responsibil- ities include fair opportunity for the presenta- tion of principal points of view on issues of public concern.[113]

The present basis for fairness obligations can be found in section 3(d) of the Broadcasting Act which stipulates that broadcasters must provide "reasonable, balanced opportunity for the expression of differing views on matters of public concern".

This requirement must be read in light of the White Paper on Political and Controversial Broadcasting Policies[114] which, though formulated by the BBG, predecessor to the CRTC, was, as earlier noted, expressly adopted by former CRTC Chairman Pierre Juneau for use by the Commission. Although the BBG expressly declined to set out specific rules with respect to controversial broadcasting, the White Paper recognizes essentially that there must be forthright discussion of all controversial

questions and that all main points of view on important issues must be presented both equally and fairly. Part III of the White Paper, in particular, provides for a right of reply to controversial material in editorials or general programming for any person desiring to express opposing views. Licensees must invite a response over the air at the time of the original broadcast. They may comply with this obligation by reading, without comment, letters written by those with contrary views. It has been suggested that in the absence of concrete guidelines and a positive requirement on licensees to solicit spokesmen for opposing opinions, the Canadian concept of freedom of speech in broadcasting merely includes a listener's right of reply but does not refer primarily to the listener's right to hear all points of view on public matters, as in the United States.[115]

In regard to personal attack situations, the BBG chairman testified at the 1961 Parliamentary Hearing into Broadcasting as follows:

> We take the position that if any group of people are referred to detrimentally in a broadcast, then they have the right to reply, and it does not matter whether they are a political party or some other group. This is the essential principle; the right to reply in a controversial broadcast.[116]

Juneau, in his speech to the Canadian Association of Broadcasters at its annual meeting in May 1972, also made it clear that in personal attack situations, the licensee must provide an equitable opportunity for the aggrieved party to respond.[117]

The CRTC has recognized fairness principles in two important decisions, the "Air of Death" case[118] and the CHNS (Miles for Millions) case[119], both discussed in the second chapter of this paper.[120] In formulating guidelines to ensure fairness in public informational programming, the CRTC explicitly stated in the Air of Death decision that issues must be identified as controversial and dealt with fairly. Nevertheless, there was found to be no obligation on a broadcaster, in every program, to present all sides of an issue or give all opposing views equal attention, as long as the issue is dealt with fairly in the context of total programming. In the "Miles for Millions" case, which involved a personal attack situation, the CRTC imposed more stringent standards than found in even the American personal attack rules. The CHNS editorial had compared one of the beneficiaries of Miles for Millions funds to the FLQ. It also concluded that some of the funds would wind up with Castro supporters and that Miles for Millions had "gone

political". The Commission held that the editorial constituted an "attack" and that CHNS had breached its duty to provide an equitable opportunity for the expression of differing views on a matter of public concern. CHNS should have granted the Miles for Millions organization "equitable" air time and delivered to it, prior to the broadcast, a copy of the editorial and a notice of the times it was to be aired. In this case, CHNS had given a Miles for Millions representative an opportunity to reply twenty minutes following the editorial broadcast, with only a ten minute warning. The representative had not heard the editorial, and only learned of the allegations at the beginning of his reply time on the air during an Open Mike program. Two other representatives called and attempted to respond to the attack during this program. The editorial was repeated four times that day and excerpts from the Miles for Millions reply were presented during later CHNS newscasts. A further editorial commentary, repeating the original charges was aired by CHNS the next day. The Miles for Millions representatives refused to participate in another Open Mike program following this later broadcast.

As in the United States, a Canadian licensee retains wide discretion on how to fulfill his fairness obligations. The license renewal procedure provides a sufficient inducement to Canadian broadcasters to comply with these requirements as it does to their American counterparts. The threat that the CRTC would refuse to renew CHNS's license if the station did not toe the line in future was clear in the Miles for Millions case.

The extent of a licensee's fairness obligation poses a more severe problem in Canada because the principles involved are general and vague, and there are no stipulated standards of conduct as found in the American fairness doctrine. Broadcasters must rely much more on their own interpretation of the general statements in the White Paper and section 3 of the Broadcasting Act. It does appear, however, based on the wording of the White Paper, that fairness principles apply in the context of general programming, including entertainment programming, as well as editorials. Commercial advertisements are presumably caught as well, although that is not clear from the White Paper itself.

Most importantly, the fairness principles discussed above have not been put to a constitutional test

as they have in the American Red Lion case. With the recent adoption of the Canadian Charter of Rights, this will become an important issue. The answer will depend, as in the United States, upon the sufficiency of the various justifications for government regulation of broadcasting content, discussed below.

In summary, therefore, the American broadcasting system has always relied exclusively upon the private sector for its existence, although the rapid proliferation of private commercial enterprises in the United States necessitated the creation, early on, of an independent agency to organize traffic on the airwaves through a licensing system. In Canada, by contrast, the system was developed as a tool for the promotion of national unity and public policy, and therefore relied to a large extent upon a national network and extensive centralized control. Given these divergent backgrounds and underlying policies, the various rationales for content regulation discussed below do not necessarily each have the same significance in the two countries.

That having been said, however, it should be recognized that there is also a great deal of commonality. Both countries view the airwaves, to a

greater or lesser extent, as a public resource. This theory is central to the legitimacy of broadcast regulation. Because the airwaves are seen to be a public resource, a broadcast licence imposes a trust on broadcasters to serve the public along the lines of legislated policy, such as outlined in section 3 of the Broadcasting Act, in exchange for access to the spectrum.

In this "Trusteeship Model"[121] of regulation, broadcasters are "trustees" of various public rights including, in Canada, the public's right to original Canadian productions, and in both Canada and the United States, its right to balanced coverage of controversial issues and access to all points of view. In return, broadcasters receive licenses and, to a certain extent, are protected from injurious competition. For example, when the FCC considers a license application for a new station, it must take into account evidence offered by existing licensees that the proposed license will have a detrimental economic impact upon them. If that detriment is substantial, the FCC must deny the license on that basis.[122] Licenses cannot be bought and sold freely in either Canada or the United States. All transfers of ownership must be approved by the CRTC or FCC. The licensing process itself is at times an economic giveaway,

ignoring the real market value of licenses. Instead of charging a realistic licensing fee, the regulatory authority concentrates upon detailed conditions of operation. The result is that licence holders hold a commodity of considerable economic value at a licencing fee which is substantially below cost, and their continued good fortune depends upon the goodwill of the regulatory authority at licence renewal time. This gives the authority considerable extra-legal, informal authority to "regulate by raised eyebrow".

With this as background, I shall now review the various rationales, all of which are predicated on the theory of public trusteeship, for regulation of broadcasting.

2) Rationales for Broadcast Regulation

i) Spectrum Scarcity Doctrine

The spectrum scarcity rationale for broadcast regulation is as follows: because there is a finite number of usable frequencies and a concomitant limitation on access to the airwaves, the government is both entitled and obligated to allocate this scarce public resource in the public interest.

The original expression of the scarcity justification is found in the decision of Mr. Justice Frankfurter in the NBC case:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.[123]

It should be noted that Mr. Justice Frankfurter expressly stated that the Commission did not have the power to select licensees on the basis of their political, economic and social views,[124] which would seem to preclude content-based regulation. In the NBC case, for example, the Court upheld regulations designed to prevent "chain-broadcasting", that is, rigid contractual relationships binding individual stations, inter alia, to broadcast exclusively the programming of one of the major networks and thereby prohibiting broadcasters from choosing programming to fulfill community needs.[125] However, gradually the FCC's power expanded to include considerable control over broadcast content.[126]

Red Lion Broadcasting Co. v. FCC,[127] is the leading case in which the United States Supreme Court

relied on the scarcity rationale to support a content-based restriction. The dispute centred on the personal attack rules,[128] which, as already noted, require a broadcaster to afford free reply time to an individual attacked in its broadcast. Mr. Justice White, speaking for the Court, held:

> In view of the scarcity of broadcast frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here... constitutional.[129]

Underlying this decision was the philosophy that in the broadcasting context, the right to freedom of expression is best protected by ensuring the right of listeners and viewers to be informed. Therefore it is their rights, rather than the right of broadcasters to speak, which are paramount. This philosophy can be traced back to the notion that the purpose of free expression is to preserve democracy by creating a marketplace of ideas in which governmental criticism and controversial or unpopular opinions can be aired without inhibition or restriction. The dichotomy which exists at least in theory between the print and electronic media is that in the former there is nationally unlimited access. Anyone with a printing press can theoretically start a newspaper. The argument

therefore runs that it is possible to create a marketplace of ideas in the print medium due to the diversity of written publications available - books, newspapers, magazines, pamphlets, circulars. In broadcasting, limited usable frequencies restrict the number of voices which can be heard, and thereby supposedly render such diversity impossible in an unregulated market. This rationale supports government regulation in broadcasting:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by Government itself or a private licensee.[130]

Under the scarcity rationalization of the Trusteeship Model, therefore, broadcasters are granted exclusive access to the airwaves on the condition that they act as public trustees of the right of listeners to hear and be informed of diverse viewpoints.[131]

In CBS v. FCC,[132] the Supreme Court maintained the distinction between the print and broadcast media in the context of broadcaster discretion under the First

Amendment. The Supreme Court upheld a statutory right of access to broadcast facilities created by Congress for individual candidates seeking federal office,[133] even though such legislation if applied to newspapers would be considered an unconstitutional infringement of broadcasters' rights to freedom of expression.[134]

The most recent affirmation of this rationale for government regulation of broadcasting can be found in FCC v. League of Women Voters.[135] The U.S. Supreme Court struck down section 399 of the Public Broadcasting Act of 1967[136] which prohibited any editorializing by public broadcasting stations receiving public funds from the Corporation for Public Broadcasting (CPB). By a five to four majority, the Court held that such a blanket restriction violated the public broadcasters' First Amendment rights. The FCC had argued that the restriction was necessary, first, to prevent broadcasters from airing pro-government propoganda to protect their federal funding and, second, to prevent licensees from editorializing in favour of private partisan views. Mr. Justice Brennan, for the majority, was not convinced of the seriousness of these alleged dangers and held, further, that in any event, section 399 was a poor solution for the problem. Section 399 went right to the core of First Amendment rights and was accordingly particularly suspect.[147]

It is important to recognize, however, that League of Women Voters is not a retreat from either Red Lion or the spectrum scarcity rationale. On the contrary, both were reaffirmed; Mr. Justice Brennan repeated the spectrum scarcity rationale as the basis for distinguishing between the print and electronic media.[138] Content regulation is impermissible in the former context. In the latter, Congress has some, although according to the holding in League of Women Voters not absolute, discretion to regulate in the public interest.

Therefore, in the United States, the scarcity rationale remains the chief justification for government regulation of broadcasting. It is interesting that the Court in League of Women Voters, expressly refused to consider the emerging technological evidence which indicates that the scarcity doctrine is becoming increasingly suspect as a rationale for regulation. Instead, it left the issue to Congress and the FCC. While this may be appropriate in some cases, it is highly questionable here where the state of technology forms the pivot of Congress' justification to regulate. One would therefore have thought that, with the state of the technology being decisive on the question of constitution-

ality, the Court would have an obligation to review independently and critically the factual underpinnings of the scarcity doctrine itself.[139] It should not leave this evaluation to the bodies with the greatest interest in preserving the scarcity doctrine as a potent constitutional force.

Certainly, the factual underpinnings of the spectrum scarcity doctrine are being questioned. There are several ways in which the number of broadcast channels can be increased.

First, channels can be added by decreasing the bandwidth of existing channels. Spectrum-saving techniques have already been employed in land mobile and cellular radio as well as video conferencing. By reducing AM channels from 10 to 9 KHZ, an additional 12 channels could be created. Similarly, FM channels could be increased to five or seven times the present number. The same techniques should be applied to television. Although bandwidth reduction might require a substantial investment in new, higher quality equipment by broadcasters and consumers, the benefits to be gained from a change-over in terms of extra "space" may outweigh the disadvantages. In any event, the space is available.[140]

Second, that part of the spectrum reserved for commercial broadcasting can be increased by taking over other portions now reserved for military or civilian uses such as aviation, common carrier and amateur radio communications.[141]

Third, additional channels can be accomodated by devising more flexible interference rules. For example, interference problems could be resolved by negotiation among licensees; a licensee could pay for the termination of objectionable interference.[142] The creation of a low power service to operate in a small area could be added without creating destructive interference problems.[143] In fact, the FCC has permitted the addition of new AM radio stations based on predicted levels of interference[144] and is considering a similar approach to FM.[145]

Fourth, the transfer or subdivision of the broadcasting rights of current licensees would allow for more efficient use of the spectrum. The current system provides no incentives for broadcasters to discover and implement a more "intensive"[146] use of the spectrum by, for example, developing less expensive technology for reducing the broadcasting bandwidth or even instituting

time-sharing schemes. In addition, the problem of the limited number of available television channels in the United States results in part from the allocation scheme chosen by the FCC which favoured local VHF outlets, instead of allocating frequencies in the more plentiful UHF band. Moving commercial television to UHF frequencies would increase the number of available channels. Furthermore, many channel frequencies in areas outside the large cities remain unclaimed. The scarcity problem in these situations is economic[147] rather than physical and in that sense broadcasting should be in exactly the same position as the print press insofar as susceptibility to regulation is concerned.

Fifth, new technologies have created many alternatives to over-the-air broadcasting. Audio cassettes and records compete with radio channels. Direct satellite broadcasting[148] and cable television have greatly expanded the number of available channels in the television medium. A single coaxial cable has the potential to carry fifty-four television stations. In addition, television video provides the viewer with an unrestricted choice of programming. Developments in fibre optics create virtually unlimited possibilities for the future.

Finally, it is arguable that, in considering the scarcity problem and the public's right to information, broadcasting should not be considered in a vacuum. Newspapers, magazines, books, fliers and other aspects of the print media also constitute sources of information which supplement the electronic media and mitigate against scarcity problems inherent in the system.[149]

In summary, broadcasting resources can be greatly expanded through a more efficient use of current technology, the continued development of new improved technologies and a revision of regulatory policy in certain areas. Although the points discussed above militate strongly against the viability of the scarcity doctrine as a long term constitutional justification for broadcast regulation, the new technologies are not all currently available on a commercial basis. Accordingly there is still some justification for the scarcity rationale, if not as the sole support for regulation.

A more telling factor than spectrum scarcity in limiting the number of broadcasters with access to the airwaves, is the substantial economic barriers to entry into the broadcast industry. Millions of dollars are needed in start-up costs and advertising revenues. The

difficulty with this factor as a justification for broadcast regulation is twofold. First, it is submitted that a limitation on a person's right to speak simply because he has the financial resources to communicate effectively goes to the heart of the freedom of expression guarantee. If the policy underlying freedom of expression is an unfettered interchange of ideas - the "breath of life of Parliamentary institutions", according to Duff J. in the Alberta Press Case[150] -- the curtailment of a powerful speaker merely because he is powerful does not further that constitutional value. A better solution to the problem of economic disparity would be to support disadvantaged speakers rather than limit the rights of others.[151]

Second, this economic barrier to entry rationale cannot be limited to the broadcast media. The traditional distinction between the broadcast and print media has been based upon the notion that there are no barriers to entry in the latter context. Anyone with a printing press to run off flyers can be in business.[152] As a practical matter, of course, nothing could be farther from the truth with respect to any publication with significant influence. The tremendous amount of capital required to establish and maintain a viable newspaper creates barriers

which are just as real as those in broadcasting. There is evidence in the growing trend toward wire services, newspaper chains and multi-media conglomerates that small independent operators cannot survive in major markets. Concentration has decreased diversity in the print press as well as in the broadcasting industry.[153] While American courts have maintained a constitutional dichotomy between the broadcast and print press based upon scarcity and barriers to entry in the former which are supposedly absent in the latter, the facts do not support this distinction. Either broadcast regulation will have to be relaxed to account for only those unique characteristics of broadcasting which require special consideration, or regulation will have to be extended to the print press. It is submitted that the latter solution is not viable given the very high constitutional value put on freedom of the press in both the First Amendment to the U.S. Constitution and section 2 of the Charter of Rights. Accordingly, the former solution should be adopted.

(ii) Canadian Culture and Unity Doctrine

One of the factors which may distinguish the electronic media in terms of a special susceptibility to regulation, at least in Canada, is the historical Canadian view of broadcasting as a public service.

Canadians have traditionally viewed broadcasting as a vehicle for national unification and the development and protection of Canadian culture. This is a unique perspective, not shared by Americans. As previously discussed, the Aird Commission Report of 1929 was the first official statement that broadcasting should be regarded as an instrument for the fulfillment of national goals. It resulted in the creation of a dual system in which the public sector (the CRBC and later, the CBC) dominated and even regulated the private sector. The predominance of the national network was perpetuated by successive pieces of legislation. It was not until 1958 that the BBG, an agency independent of the national network, was empowered to regulate the entire industry. Section 10 of the Broadcasting Act of 1958 set up the BBG:

> for the purpose of ensuring the continued existence and efficient operation of a national broadcasting system and the provision of a varied and comprehensive service of a high standard that is basically Canadian in content and character.

The recognition of the independent role of private broadcasters in the 1958 legislation created a new concern on the part of the regulators to ensure that the private sector also conformed to public policy goals. As a result the BBG issued in 1960 the first set of Canadian content regulations which took the form of percentage requirements

for Canadian content in television. The great fear was that, in the absence of Canadian content quotas, the market would be flooded with American imports threatening Canadian culture and independence.

This view of broadcasting as a national service industry has been carried forward into the current legislation as an expression of Canadian public policy. Section 3 of the Broadcasting Act declares that

> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political and social and economic fabric of Canada.
>
> (d) ...and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources.
>
> (g) the national broadcasting service should
>
> (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity,
>
> (h) where any conflict arises between the objectives of the national broadcasting service and the interests of the private element of the Canadian broadcasting system, it shall be resolved in the public interest but paramount consideration should be given to the objectives of the national broadcasting service.

The policy provision found in section 3 constitutes more than a preamble. It is an integral part of the Act, with

legal force and effect. The succeeding provisions must all be interpreted in the context of section 3.[154]

The Act therefore restates the public objective of protecting Canadian culture from American influences by ensuring Canadian ownership and content. Moreover, the CBC goals of developing national unity and Canadian identity continue in almost all cases to take precedence over the interests of the private sector. As recently as January 31, 1983 the CRTC has stated that:

> Canadian programs must in general reflect Canadian experience and the social, visual and linguistic ideas of the country. At the same time, Canadian television should provide quality programs that speak to universal themes - programs of widespread appeal, that can compete both domestically and internationally.
>
> Canadian television programming must attract, engage and entertain... for if Canadians do not use what is one of the world's most expensive and sophisticated communications system to speak to themselves - if it serves only for the importation of foreign programs there is a real and legitimate concern that the country will ultimately lose the means of expressing its identity...[155]

It is important to consider this distinctive Canadian attitude when attempting to analyze any conflict between the Charter guarantee of free expression and government regulation of broadcasting. Even if the scarcity doctrine can no longer "demonstrably justify"

limitations on expression, the emphasis on national objectives which grew out of the peculiar geography and history of Canada may tilt the balance, within reasonable limits, in favour of those sorts of content regulation which further the goals of cultural unification and identity. The most obvious example is the CRTC's Canadian content rules. However, this justification, even if valid, does not support the validity of more substantive forms of content regulation such as the high standards requirement in section 3(c) of the Broadcasting Act or the equality provision in the proposed section 3(c.1). It is submitted that such guidelines do not further national objectives regarding cultural unification and identity which are distinctively Canadian.

(iii) Prior Grant Theory

Another justification for broadcast regulation which has been put forward and recognized by some American writers[156] is the "prior grant" theory. Under this rationale, government may regulate licensees because they were initially granted, over other applicants, exclusive access to the airwaves, and then protected by the government from competition. This is basically an outgrowth of the scarcity doctrine since the initial selection of broadcasters was necessitated by the limited

number of available frequencies. In fact, support for this theory has been found in Red Lion which is known primarily as a scarcity doctrine case:

> The fact remains that existing broadcasters have often attained their present positions because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses.[163]

As competition and the number of competitors increase with the advent of new technologies, it is submitted that this justification will not retain vitality.

(iv) Public Ownership Theory

The public ownership theory is another justification which had developed along with the scarcity rationale: because there are a limited number of commercially usable frequencies present, those available are considered to be public property and, accordingly, are susceptible to government regulation in the public interest. Unfortunately this rationale of public ownership has taken on a life of its own, divorced from the underlying fact of frequency scarcity which was the most important factor in giving it life. The American Supreme Court has stated that the airwaves constitute a national resource which is part of the public domain, thereby equating the electromagnetic spectrum with other publicly owned resources such as, for example, waterways:

> [B]oth radio and television broadcasting utilize a natural resource - the electromagnetic spectrum that is part of the public domain. And, although broadcasters are granted temporary use of this valuable resource for terminable three year periods, 'ownership' and ultimate control remain vested in the people of the United States.[158]

This rationale has been applied even more forcefully recently by the Canadian Federal Court of Appeal in Re New Brunswick Broadcasting Co. Ltd. and CRCT.[159] There, the public property rationale was used to support government regulation without any analysis of why there should be public ownership and regulation of airwaves, or of any other possible bases of constitutional support for regulation. In answer to an argument that a blanket refusal of broadcast licenses to newspaper proprietors violated section 2(b) of the Charter, the Court went so far as to deny that the refusal of a license implicated freedom of expression at all. The sum total of its reasoning was as follows:

> "In my opinion, the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public

> building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the Broadcasting Act. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. It would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by para. 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute, there is, in my opinion, no occasion or need to resort to s. 1 of the Charter to justify the licensing system established by the Broadcasting Act.
>
> Accordingly, I would reject the appellant's submission".[160]

A telling criticism of the above passage is that public ownership of the airwaves does not itself justify content regulation.[161] Generally speaking, government control of speech in other public forums including municipal streets and parks has not been permitted by the courts.[162] There is, of course, overstatement of the various arguments on both sides of the debate. For example, those who argue against the validity of the public ownership rationale have sometimes done so on the basis that an intangible phenomenon such as the broadcast spectrum cannot be owned.[163] Clearly the mere fact of

intangibility is not enough to bar regulation. Airspace is subject to territorial claims, at least in an international law context. Zoning requirements, height restrictions and other similar regulation of intangibles is accepted as legitimate.

In general, for the reasons given above, a free-standing assertion of public ownership of the airwaves in section 3 of the Broadcasting Act is not enough to justify broad content-based regulation. The assertion gains more force when it is coupled with the long standing notion in Canada that broadcasting is a valuable tool for cementing national unity and instilling and propagating Canadian culture. This would not support broad-based content regulation but, if proved on the evidence to be reasonable and demonstrably justified pursuant to section 1 of the Charter, it would afford a compelling rationale for limited regulation directed at Canadian content requirements.

(v) Impact and Privacy Theories

The most currently compelling rationales for content regulation in broadcasting are the so-called impact and privacy theories. They offer the possibility of a real alternative to the scarcity rationale.

According to the impact justification, the broadcast medium has a greater influence on the public than the print medium because, first, the average person spends a large amount of time watching television or listening to the radio; second, and this may be questionable on the facts, it is asserted that the broadcast medium is the preponderant source of news and commentary; and third, the broadcast medium is pervasive, having access to a large audience with the immediacy of person-to-person communications.[164] It is therefore argued that the power of broadcasting to convey information which is used in making political and economic decisions and to shape public attitudes and values creates the need for regulation.[165]

The privacy, or "captive audience", rationale supports regulation on the basis that the broadcast audience has the right to be protected from "assault" by unwelcome and unforeseen messages.[166] In Banzhaf v. FCC,[167] the Court observed that, while the receipt of a printed message requires the positive act of reading, a broadcast message can only be avoided by an affirmative action.

These two theories of impact and privacy have been linked in the leading case of FCC v. Pacifica

Foundation,[468] the "Seven Dirty Words Case". At issue was the FCC censure of an FM radio station for airing, in mid-afternoon, a comedy monologue by George Carlin which repeated seven "indecent words". It was agreed by the parties that the monologue was not "obscene" in constitutional terms. A complaint was lodged with the FCC by a father who had been listening to the car radio with his fifteen year old son at the time of the broadcast. The United States Supreme Court upheld the constitutionality of the FCC censure. Mr. Justice Stevens, speaking for the majority, noted that the electronic media has received the most limited First Amendment protection of all forms of communication and that regulation of broadcasting is based first, on its "pervasive presence in the lives of all Americans", and second, its easy availability to children. He held that the individual's right to protection from unanticipated, offensive communications in the security of his own home outweighs the First Amendment rights of the broadcaster and other listeners:

> Patently offensive, indecent material presented over the airwaves confronts the citizen not only in public, but also in the privacy of his home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from

> unexpected profane content. To say that one may avoid further offence by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.[169]

Several criticisms have been advanced to rebut the impact and privacy theories. First, as to impact, there is a controversy about the extent of the impact of the broadcasting medium; it has been argued that, according to the research, the mass media reinforce pre-existing ideas rather than change them, particularly with respect to political programming where there is a higher resistance to persuasion than with commercial advertising.[170] It is difficult to assess the weight which should be given to this sort of research. The relationship between broadcasting and public attitudes may be too subtle and complex for accurate measurement. Furthermore, it may be that broadcasting's greatest impact is not in changing settled perceptions, but in shaping those which have either not yet been formulated or, if formulated, not yet hardened.[171]

The second criticism which has been suggested is that while the broadcast medium as a whole may have a pervasive influence, individual licensees do not, due to the fact that most viewers and listeners turn to a variety of stations.[172] The counter argument is that the impact

of broadcasting as a whole should be measured in order to justify regulations which do not so much censor individual licensees as set standards for the entire industry.

Third, and in my view the most serious criticism, the premise that broadcasting has greater impact than the print media may be false. Furthermore, even if true, it is questionable whether the mere fact that a medium is highly effective is sufficient to justify regulation. At the time when the First Amendment to the American Bill of Rights was adopted in 1789, the printed word was the only available means of mass communication. The powerful role of the press in the democratic process was the very reason that First Amendment protection was deemed essential. The impact argument therefore cuts both ways. One might argue that given the important role of broadcasting today, there should be less regulation rather than more.[173]

It should also be noted that many Canadian and American cities today are serviced by one major newspaper.[174] This arguably makes these newspapers a "pervasive influence" in their particular markets, and yet both Canadian and American courts have zealously protected newspapers' editorial discretion as to content.[175] In Miami Herald Publishing Co. v. Tornillo[176] the United

States Supreme Court struck down a Florida law which granted a right of reply to a political candidate whose character or record had been attacked. The Supreme Court of Canada has held that editorial discretion in the print media overrides any notion of public access, even in the advertising sector. In Gay Alliance Towards Equality v. Vancouver Sun,[177] the Court upheld the right of the Sun to deny a homosexual group access to advertise its "Gay Time" publications in the classified section notwithstanding that the ad was inoffensive and did not imply any support for the message on the part of the Sun. This case is an interesting counterpoint to the Re New Brunswick Broadcasting case, discussed earlier, where the Federal Court of Appeal held that the applicant did not need a license to air its messages, partially because it had "the same freedom as anyone else to air its information by purchasing time on a licensed station". What if the licensee refuses to sell the time? Would the Federal Court of Appeal then hold that the licensee, being given the privilege of using a public resource, had an obligation to sell time to all those requesting it? If the answer to these questions is in the affirmative, the implication is that there is no editorial discretion in licensees. On the other hand, if no such access is guaranteed, surely the Court of Appeal's response about

the ability to air one's views is more apparent than real. It may be that the New Brunswick Court of Appeal did not intend to go this far, but the discussion underlines the fact that the Court's extremely abbreviated reasons ignore very real and difficult questions.

The argument that many newspapers have a pervasive influence and that, as a result, there is no legitimate distinction on that ground between the print and broadcast media is very compelling. However, I would suggest that nevertheless a real distinction exists. The electronic media, particularly television, has had an impact which cannot be compared to that of the print media either as it existed in 1789 or as it exists today in one-newspaper towns. Newspapers are local in nature. Books, magazines and periodicals have a wider circulation, but they are insufficient in number to offer an extremely wide choice of competing viewpoints. Television is controlled by three national networks which cater to a national and international audience. With its unique ability to convey the impression of face-to-face communication, television has the potential to shape the perceptions of millions of viewers. A program like "The Day After", portraying a fictional account of a nuclear strike on an American city, was in itself a major national

and international event and effectively galvanized opposition to the deployment of American missiles in West Germany. Moreover, television is a family activity unlike any other medium. A typical evening's family entertainment is often to gather around the television set. It is an important centre of family life and has the power to shape attitudes and mores to an extent that the press cannot.

The privacy theory, based upon the rationale that unwanted messages may invade one's living room without warning, has been countered by the argument that much programming likely offends some portion of home viewers without prompting government interference.[178] As Brennan J. noted in dissent in Pacifica, the discomfort of the viewer is temporary and easily alleviated. He or she can change the channel or switch off the broadcast altogether.[179] As already noted, the majority's answer to this point is that the damage is done before the listner/viewer can act.[180]

In addition, there are alternatives to content control, such as the establishment of an audience information system composed of program ratings in television guides, prior broadcast warnings about the

nature of potentially offensive programs, and time of day standards which would require indecent material to be scheduled for late night viewing to offset the danger of children being exposed to unsuitable programming. Mr. Justice Powell in Pacifica suggested that the Carlin recording may have escaped censure had it been broadcast late in the evening to an adult audience.[181] The difficulty with these alternatives for the purposes of this paper is that, while they may circumscribe the undesirable effects of airing obscene or indecent material, they do not solve a problem like sex-role stereotyping or programming characterized by bigotry toward any minority groups in society. It would not be realistic, or probably even possible, to expect networks to rate or zone material which promotes discrimination by subtleties and inferences that are often not easy to identify, let alone categorize. The difficulty of identifying this kind of programming with any precision in certain cases is a major issue in the next chapter.

(vi) Conclusion

In summary, it is submitted that of the various rationales for content regulation in broadcasting, only three can potentially justify content regulation of the broadcast media. The scarcity doctrine, while still a

factor to be considered in the electronic world, is fast becoming obsolete in light of ever increasing advances in technology. The only rationales with continuing viability are the national unity doctrine, which provides scope for Canadian content regulation, and the impact and privacy theories. It is submitted that these rationales continue to offer a distinction between the print and electronic media.

Television today unites audiences on an international level, reaching millions of viewers with the power of inter-personal communications. A vast portion of Canadians rely on television as the major source of news and commentary[182]. It is, moreover, an important part of family life, a shared activity, centred in the home. As an unfortunate by-product of its role in providing family entertainment, television has the potential to invade the privacy of the home with programming that the family may find offensive, particularly to children who have a fairly unrestricted access to the television set. Audience warning systems and time of day zoning offer an alternative to outright censorship in the case of "indecent" material, but may prove inadequate to cope with more subtle problems like sex-role stereotyping and other forms of discrimination. The question remains as to what

form of regulation, if any, should be imposed. This depends upon balancing these rationales together with the regulatory objectives in question as against the freedom of expression guarantee in section 2(b) of the Charter. In the context of this paper, therefore, government policy to promote equality, given the impact and potential intrusiveness of the broadcasting medium, must be weighed against an equally important government policy to safeguard freedom of expression. The conflict between these two Charter guarantees is discussed in the next chapter.

Chapter IV The Proposed Amendments to the Broadcasting Act in Bill C-20: Constitutional and Policy Implications

This chapter will address the constitutional and policy implications of sections 3 and 4 of Bill C-20. It should be noted that there are now broad areas of overlap between public policy and constitutional law with the advent of the Charter of Rights, and accordingly the two subjects will be discussed together where appropriate. I shall divide the analysis into two parts: first, on the legal and policy justifications for implementing the equality objectives embodied in the proposed section 3(c.1) by prohibiting programming which is abusive of individuals or groups distinguished by race, ethnic or national origin, religion, colour, age, sex or mental or physical disability, and, second, on the justifications (or lack thereof) ~~for~~ by prohibiting less extreme forms of stereotyping insofar as it affects section 3(c.1) categories. It will be seen that the issues arising in an analysis of both abusive programming and stereotyping in programming are very much the same regardless which minority group is the object of discrimination. Therefore, for example, most of the principles which apply to sexually abusive programming or sex-role stereotyping will apply with respect to programming which discriminates in these ways against racial minorities. Accordingly, the

discussion will not be repeated unless additional factors or circumstances which are peculiar to particular categories and not others are present.

1) Charter Principles Generally

The Canadian Charter of Rights and Freedoms is a constitutionally entrenched instrument, mandating the courts to take a more interventionist stance than they did under the statutory Bill of Rights. The cases to date clearly indicate that the courts are not following the old "presumption of constitutionality" rule as they did in pre-Charter cases. The Charter provides its own procedural scheme for establishing that restrictive legislation or government action is unconstitutional. It is important, before analyzing any attempts by the CRTC to regulate abusive or stereotyped programming, to outline generally the requirements for proving that the right to freedom of expression has been unconstitutionally violated under the Charter.

Section 1 of the Charter prescribes a two-step approach to Charter adjudication. The first step is to determine whether a guaranteed right or freedom has been infringed. The second is to decide whether the infringement is saved by section 1 as a "reasonable limit

prescribed by law which can be demonstrably justified in a free and democratic society". The Ontario Court of Appeal in Re Federal Republic of Germany and Rauca put it this way:

> In our view, the issue was to be approached in two steps. First it has to be determine whether the guaranteed fundamental right or freedom has been infringed, breached or denied. If the answer to that question is in the affirmative, then it must be determined whether the denial or limit is a reasonable one demonstrably justifiable in a free and democratic society.[183]

The initial burden therefore is on the applicant seeking a Charter remedy to establish that a Charter guarantee has been violated. At this stage of the inquiry Charter guarantees should be given a wide interpretation. In Re Soenen and Thomas, a decision of the Alberta Court of Queen's Bench, McDonald J. stated:

> ...it seems to me that the rights and freedoms guaranteed by the Charter must, before any application of the limiting part of s. 1, be interpreted in an absolute sense that does not involve the application of any judicially-created criterion designed to limit the scope of judicial review. It is only when the limiting part of s. 1 is invoked and applied that any issue of balancing of individual interest against those of the collectivity, or any other such judicially-created limiting device, comes into play. If it were otherwise, that is, if the guaranteed rights were themselves relative in their content, s. 1 would be redundant. Moreover, the framers of the Charter having taken the care in s. 1 to articulate the grounds on

> which the guaranteed rights and freedoms may lawfully be limited, it would be presumptuous for Canadian judges to develop other grounds on which those rights and freedoms may be limited.[184]

McDonald J. distinguished the American approach to the American Bill of Rights on the basis that it does not contain any provision similar to section 1 of the Charter. Accordingly, American courts must impose judicial limits on the otherwise textually absolute Bill of Rights guarantees. In the Charter, on the other hand, the relationship between the enumerated guarantees and section 1, as well as the dominant trend in Charter jurisprudence, point to a broad application of all Charter rights and freedoms subject only to the limitations in the latter part of section 1.

Nevertheless, Canadian courts have not taken a broad approach in all cases. There has been some confusion about whether the freedom of expression guarantee in section 2 of the Charter encompasses artistic and commercial expression.

Section 2(b) expressly guarantees:

> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[185]

In Re Ontario Film & Video Appreciation Society and Ontario Board of Censors,[186] the very wide censorship powers of the Ontario Censor Board were challenged as violating section 2(b). The enabling legislation[187] contained no standards whatsoever to regulate the exercise of the Board's discretion. The Divisional Court unanimously struck down the legislation on that ground. In the course of its reasons, the court expressly declared that artistic expression is comprehended by section 2(b):

> It is clear to us that all forms of expression whether they be oral, written, pictorial, sculpture, music, dance or film are equally protected by the Charter.[188]
>
> ...
>
> The Charter... does not countenance the total eradication of freedom of expression for those who use a particular form of expression such as film.[189]

The Divisional Court's decision was upheld on appeal by the Ontario Court of Appeal,[190] and the Court of Appeal reaffirmed its approval in R. v. Videoflicks Ltd.[191] Tarnopolsky J.A., speaking for the Court of Appeal in Videoflicks said:

> "As the Divisional Court held in Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. (2d) 583 at

> p. 590, 147 D.L.R. (3d) 58 at p. 65, 34 C.R. (3d) 73, freedom of expression under the Charter must extend to all forms of expression. I would add that this applies to all phases of expression from maker or originator through supplier, distributor, retailer, renter or exhibitor to receiver, whether as a listener or a viewer. This view of the ambit of s. 2(b) of the Charter is supported by the more fully defined but comparable art. 19(2) of the Covenant on Civil and Political Rights:
>
> Article 19
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[192]

In Nordee Investments Ltd. v. The Corporation of Burlington,[193] a case involving an opaque clothing by-law, Cory J.A., speaking for the Ontario Court of Appeal, held that the by-law was in conflict with the Criminal Code and therefore inoperative. It was therefore unnecessary to use the Charter. However his comments indicate that artistic expression is an independent value worthy of protection:

> ...it would seem that dancing can express ideas and emotions just as forcefully and artistically as do the written word, the graphic arts or music.[194]

Strangely enough, a majority of the Divisional Court in Re Koumoudouros,[195] a later case, stated in

obiter that section 2(b) of the Charter contemplates only expression related to the political and governmental domain and not artistic expression such as the nude burlesque dancing prohibited by the opaque clothing by-law under consideration. The point was not necessary to their decision since, in Eberle and Sirois JJ.'s opinion the right claimed was not freedom of artistic expression at all, but rather "to expose performers' pubic areas for the purpose of stimulating liquor sales". They held that this was not a right protected by the Charter.

Osler J., concurring in the result, differed on the effect of section 2(b) in relation to artistic expression. He held that expression may be made through any medium, including burlesque, however vulgar.[196] However, Osler J. went on to say that although the by-law was a prima facie limitation on the expression guarantee in the Charter, it was saved by section 1 as a resonable limit which could be demonstrably justified in a free and democratic society.

Mr. Justice Osler's analysis is clearly correct. It is impossible and potentially dangerous to try to separate "political" from purely "artistic" forms of expression. For example, is sex-role stereotyping on a

particular television program purely a question of dramatic style or an expression of a certain social philosophy? In my view, the majority decision in Re Koumoudouros runs counter to the decision in Re Ontario Film & Video Appreciation Society, as affirmed by the Court of Appeal. It would seem, therefore, that the better view would include artistic expression within the ambit of section 2 of the Charter.[197]

Canadian courts are just now beginning to grapple with commercial speech as an aspect of freedom of expression. Before discussing the Canadian jurisprudence, it is instructive to look first at the very well developed American line of cases in this area.

The American Supreme Court was of the view initially that commercial advertising fell outside First Amendment protection. In Valentine v. Christensen,[198] a commercial handbill had an advertisement on one side and a political protest on the other. The Supreme Court held that the handbill had a primary commercial purpose, and accordingly, the First Amendment was no defence to a prosecution for distributing the handbill contrary to a city ordinance.

In Bigelow v. Virginia,[199] however, the Court retreated from this strict position in holding that the promotion of the availability of out-of-state abortions, in addition to the commercial character of the advertisements, provided information about a constitutionally protected activity and was itself entitled to First Amendment protection. The Court refused to set precise limits on the extent to which regulation of advertising is permissible under the First Amendment, leaving it to the courts to weigh the First Amendment interest at stake against the interest allegedly served by the regulation on a case by case basis.[200]

The leading American case in the commercial speech and advertising area, Virginia State Board of Pharmacy,[201] went even further in holding that the free flow of purely commercial information is constitutionally protected as important to a free enterprise economy and that therefore a blanket ban on the advertising of prescription drug prices was unconstitutional. Although the Court struck down the regulation in question, it stated that a properly framed regulation as to the time, place and manner of advertising is permissible, in appropriate cases, as well as the control of false, deceptive or misleading advertising. Basically,

regulation of commercial speech in the United States was held to be justified where it serves a significant governmental interest and leaves open alternative channels for communication of the information.[202] The burden of demonstrating the nature and significance of the state interest as well as the existence of other channels of communication lies on the state. However, the Court clearly indicated that commercial speech is not as vigilantly protected as other forms of speech because there is less danger of creating a "chilling effect" on expression by implementing commercial regulation. The overbreadth doctrine does not apply, so that one must demonstrate that the particular speech restricted was protected speech in other to invoke the First Amendment, whether or not the regulation could also affect other protected speech.

American cases will likely be persuasive on the point in Canada, although it is still too early to make predictions with any certainty. Pre-Charter cases decided on division of powers bases are clearly open for reconsideration. For example, in Jabour v. Law Society of British Columbia[203], the Supreme Court of Canada upheld the regulations passed by the British Columbia Law Society pursuant to which a lawyer was disciplined for advertising

his business hours and prices for routine services. The regulations were enacted pursuant to legislation found to be within provincial competence. There was no discussion of freedom of expression principles.

In the leading Charter case on commercial speech, In Klein v. Law Society of Upper Canada[204], the Divisional Court had to decide whether price advertising fell within the section 2(b) expression guarantee. Callahan J., writing for himself and Elberle J., took the position that commercial speech is not even prima facie comprehended by section 2(b), and thus he never reached the issue of whether the Law Society restrictions were saved by section 1 of the Charter as reasonable and demonstrably justified in a free and democratic society.

In reaching his conclusion, Callahan J. used a purposive approach to the Charter. He said that the underlying rationale of section 2(b) was to protect political speech and democracy. As long as the institutions of government could operate freely in a context of vigorous public debate, the economic system and economic speech could be subject to regulation. Any problems or over-regulation of economic speech could be corrected by the democratic process rather than by the

courts. Callahan J. declined to follow the Virginia Board of Pharmacy holding that commercial speech is at least presumptively protected.

There are several serious problems with the majority's decision on the commercial speech point which were dealt with well by Henry J. in dissent. The greatest difficulty is that the decision cannot be easily reconciled with the clear wording of section 2(b). The provision is textually unlimited, protecting freedom of expression without restriction. The only express limitations are in section 1. Although this argument was advanced by counsel for the applicant, the majority declined to follow it on the grounds that the courts would then have to apply the standards in section 1 in different ways to political and commercial speech, more firmly to the former than the latter. This, it was thought, would lead to "chaos". It is difficult to see why this is so. The reasonableness element of section 1 clearly depends upon the nature of, and context in which, the particular right is asserted, and it is not illogical that a restriction which might be valid in the context of economic speech might not be in the context of political speech. It is far more chaotic to torture the broad language in section 2(b) to say that some categories of expression are not comprehended at all.

The second problem is that the majority in Klein never dealt satisfactorily with the American case law. The U.S. Supreme Court has interpreted the First Amendment to include commercial speech even where there is no counterpart to section 1 which limits the language of the expression guarantee. One would have thought that there is an even greater incentive in Canada to give section 2(b) a wide meaning because we have a codified limitation clause in section 1 to fall back on. Again, it is to be hoped that the majority decision will be reconsidered.

In any event, it is clear that the mere existence of a profit motive is not enough to denude expression of constitutional protection. The Ontario Film & Video decision makes it clear that expression for the purpose of making a profit is protected by the Charter:

> ...the profit motive cannot be a valid reason to prevent a film maker from showing his work, for one who shows film for profit can have no less freedom of expression than one who does so not for profit. The extent of freedom of expression cannot depend on that, for there is nothing wrong in making profit from one's art or one's ideas.[205]

It should be noted that notwithstanding the profit motive of those who exhibit films, the expression at stake is less "commercial" in nature than "political"; that is, the expression of ideas on politics, religion,

lifestyle and morality. Nevertheless, the comment quoted above should apply equally to purely promotional speech such as advertising.

As indicated by the Videoflicks quotation above,[206] where Tarnopolsky J.A. states that Article 19 of the International Covenant on Civil and Political Rights to which Canada acceded on May 19, 1976 is "comparable" to section 2(b) of the Charter, international law may be useful in helping to define our freedom of expression guarantee.[207] In addition to Article 19 of the Covenant, regard may be had to Article 10 of the European Convention on Human Rights.[208] It defines freedom of expression as including the right to receive and impart ideas and information, which presumably includes artistic ideas and commercial information, without restriction:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (emphasis added)
>
> 2. The exercise of these freedoms since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a

> democratic society in the interests of national security, territorial integrity or public safety, for the protection of the reputation or rights of others for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It should be noted that Article 10 recognizes that the licensing of broadcasting, per se is not an infringement upon freedom of expression.

Finally, a 1970 resolution adopted by the Consultative Assembly on the European Convention entitled "A Declaration on Mass Communication Media and Human Rights[209] specifically addresses the problem of the media's right to freedom of expression and states that the right includes the freedom to "seek, receive, impart, publish and distribute information and ideas". The European Court has inferred from this freedom that the public has the right to receive such information and ideas.[210] Once again this reasoning supports a wide interpretation of section 2 of the Charter.

In conclusion, it is submitted that the freedom of expression guarantee in section 2 of the Charter should be widely interpreted to include all manner of speech, whether political, moral, religious, artistic, commercial or other.

The next step in the analysis is to apply section 1 of the Charter which guarantees the Charter rights and freedoms:

> subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 places the onus on the government to justify its attempts to regulate any of the protected areas.[211] The limitation must be reasonable, prescribed by law and demonstrably justifiable in a free and democratic society.

A reasonable limitation is one which, on an objective basis, furthers a legitimate government policy and contains precise standards. This requirement can often be tied in with the constitutional imperative that the limitation be prescribed by law and demonstrably justified.

The requirement of legal prescription is satisfied by statutory law, regulation, as well as common law.[212] However, there is recent authority to the effect that limits imposed by an administrative tribunal within its statutory authority, but pursuant to an unfettered discretion, are not prescribed by law. In the Ontario Film & Video case, the Divisional Court held that certain provisions of the Theatres Act could not operate

so as to allow film censorship, because they placed an unfettered discretion in the Ontario Board of Censors to permit or prohibit the exhibition of films. The Court found that because of the importance of the fundamental freedoms guaranteed by the Charter, any limitation thereof must be defined according to precise standards:

> It is accepted that law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[213]

While the Board adhered to guidelines articulated in an internal document and a pamphlet circulated to the public, these standards had no legislative or legal force.

The Court's conclusion that the legislatively authorized exercise of discretion is not "law" is, in my submission, erroneous. The lack of standards goes to the reasonableness or justifiability of the legislation and not to legal prescription.[214] This is because, in the absence of precise standards, an individual cannot know in advance what activities are prohibited and may refrain from permissible activities for fear of violating a vague law. Furthermore, such a power can be exercised in relation to matters outside the legitimate purpose of the

legislation. Any power to restrict a fundamental freedom, whether discretionary or otherwise, must be judged according to whether, taken at its widest application,[215] that particular power furthers a reasonable government policy.

The scheme in the Ontario Film & Video case should therefore have fallen on a reasonableness or justifiability test, first, because of its potential inhibiting effect on filmmakers, and, second, because it could catch films which convey protected as well as unprotected messages. Furthermore, it could authorize the censorship of films for improper purposes such as to supress political and religious ideas, instead of to protect morality in fulfillment of an arguably legitimate government policy. In my view, blanket film censorship even on moral grounds is overbroad and therefore unreasonable, given the possible alternatives of time, manner and place restrictions. Legitimate government policy in such circumstances should be confined to protecting children who are, in law, incapable of informed consent and unwilling adults from exposure to offensive material.

It is submitted that the proper approach was taken in Information Retailers Association v. Municipality

of Metropolitan Toronto[216], where the Retailers Association challenged amendments to the general licensing by-law of Metropolitan Toronto designed to regulate the sale and display of adult books and magazines. The Association argued that the by-law was so vague or overbroad that its operation extended beyond its regulatory objective, thereby constituting an unreasonable limitation on freedom of expression. Robins J.A., speaking for the Ontario Court of Appeal, found that by including all visual erotica as well as "girlie or skin" magazines, the by-law was broader in its application than necessary to achieve its legitimate purpose and could have the effect of prohibiting the display of legitimate works of art and photography. Moreover, it was further held that the by-law's vagueness could cause booksellers seeking to protect their licenses to avoid all problems by self-censorship, that is "by not selling books which by any stretch of the interpretive imagination can be said to fall within the ambit of the by-law".[217] This would limit the marketing of a protected form of expression and interfere with the public's right of access to non-obscene erotica. According to Robins J.A., this was fatal to the by-law:

> ...so long as the regulation is sufficiently limited in its reach and sufficiently precise in its terms to enable retailers to know with

> reasonable certainty what magazines are covered, reasonable regulation as to manner and place of display will not infringe the protected freedom. In that case of the by-law, whether it be seen as overbroad or vague (and an element of vagueness is intrinsic in overbroad legislation) the vice is essentially the same: it lacks a definition proportionate to its aim which would give those governed by it and those who administer it a reasonable opportunity to know what is covered by it, and to act accordingly.[218]

Similarly in Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise,[219] Hugessen J., speaking for the Federal Court of Appeal, held that a prohibition against the importation of material "of an immoral or indecent character" under the Customs Tariff[220] was so uncertain and vague as to constitute an unreasonable restriction or the right to freedom of expression guaranteed by section 2 of the Charter:

> In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.[221]

Another question is whether the requirement of legal prescription includes obligations imposed by international agreements such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racism, the International Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Economic, Social and Cultural Rights. For example, the first two treaties recognize that the right to freedom of expression may be limited by laws relating to very specific areas including national security, territorial integrity, public safety, order, health or morals, the disclosure of confidential information, the authority and impartiality of the judiciary, and the reputations and rights of others to privacy.[222] Presumably, this would cover, inter alia, Criminal Code offences of treason, obscenity and contempt of court, as well as the law of defamation. In short, these are the very types of restrictions recognized in pre-Charter cases such as Alberta Press,[223] Saumur[224] and Switzman.[225] Must one argue, therefore, that restrictions imposed on expression in broadcasting fall within the exceptions enumerated in these international agreements, in order to be "prescribed by law" within the meaning of section 1 of the Charter?

Canadian cases have been divided as to whether domestic law should be interpreted in light of international agreements. In Re Drummond Wren,[226] Mackay J. used the United Nations Charter to find that a restrictive convenant violated public policy and was, therefore, void. The Ontario Court of Appeal, however, upheld a similar covenant in Noble and Wolfe v. Alley[227] on the ground that public policy was a matter for the legislature to decide. In Re Alberta Union of Provincial Employees and the Crown,[228] the Alberta Court of Appeal examined numerous international documents in deciding that a provincial law which denied the right to strike to public service employees does not violate Canada's international legal obligations. In any event, whether or not international law should be used as an aid to interpreting domestic law, it is clear that no domestic rights can be founded directly upon it as an independent source of legal right. Laskin C.J., in Bhadauria v. Board of Governors of Seneca College,[229] inferred that international agreements which have not yet been implemented by competent legislation cannot give rise to independent rights. Thus a properly enacted limitation on a Charter right is prescribed by law, notwithstanding any provision to the contrary in a domestically unimplemented treaty.

However, international treaties and conventions are certainly evidence of what is "demonstrably justified in free and democratic societies". On this reasoning, limitations which do not fall into the categories found in the European Convention on Human Rights or the International Covenant on Civil and Political Rights, for example, may not be "justified" under the Charter. Other considerations relevant to this requirement include Canadian government policy and the state of the law in other democratic countries such as the United States and Great Britain.

It is particularly at this stage of the analysis that one has to fall back on many of the principles expressed in the early division-of-power cases decided before the advent of the Charter. The high value traditionally assigned the right to freedom of expression in Alberta Press, Saumur, and Switzman will require the state to meet a very high standard in order to demonstrably justify any restrictions of that right under the Charter. To that end, Canadian courts will scrutinize legislation closely in order to determine whether the effect of legislation, regardless of its language or stated purpose, is to limit freedom of expression, just as in the Saumur case. That limitation will likely have to

fall within the traditionally permissible categories of restriction enunciated by Duff C.J. in the Alberta Press case, restrictions based upon decency and public order and the protection of certain private and public interests such as the right to be protected from defamation and sedition, as well as those categories recognized by international treaty which are noted above. In addition, it will have to be established that any limitations on freedom of expression are drafted in the least restrictive way possible to achieve the desired public policy objective.[230] Otherwise, the balancing process will remain weighted in favour of the highly valued right of free speech. Finally, the context in which the expression occurs, in this case broadcasting, will have an important bearing on the outcome of the balancing process.

2) Prohibition Against Abusive Programming

As previously discussed in Chapter II, the CRTC has already sought to implement, in part, the equality objectives expressed in the proposed amendment to the Broadcasting Act, section 3(c.1). The abusive programming regulation, passed in furtherance of the high standards requirement in section 3(c), addresses the more extreme forms of discrimination in broadcast programming. Assuming that this regulation was within CRTC jurisdiction

as creating industry-wide standards rather than authorizing post facto censorship on an individual program basis, it would simply derive additional authority from the enactment of the proposed section 3(c.1). Therefore I propose to examine the constitutional implications of the abusive programming regulation as a whole, adapting the analysis where necessary to each of the categories enumerated in section 3(c.1). It should be noted that abusive programming which constitutes obscenity within section 159 of the Criminal Code would also be caught by the Broadcasting Regulations prohibiting broadcasts "contrary to the law".

As a preliminary matter, CRTC enforcement of the abusive programming regulation clearly constitutes government action which brings the Charter into operation. First, the CRTC is a public authority created by Parliament pursuant to section 5 of the Broadcasting Act. It falls under the direct supervision of both the Minister of Communications and the Governor in Council with regard to a number of important functions.[231] Its power to allocate and regulate public airwaves derives from Parliament, and state enforcement apparatus is brought to bear to ensure compliance with its regulations and directives. The CRTC is, therefore, clearly

"government" within the meaning of Section 32 of the Charter.

The first question is whether a licensee who is prohibited from broadcasting programming in contravention of the abusive programming regulation can establish that his right to freedom of expression has been infringed. For the reasons outlined in the first part of this Chapter, I have concluded that the freedom of expression guarantee in section 2 of the Charter must be broadly interpreted to include all forms of expression whether political, religious, moral, artistic or commercial. It is submitted, therefore, that a ban on programming abusive of minority groups in editorials, documentaries, news programs, entertainment programming and commercials constitutes a prima facie violation of the Charter.

The next step is to turn to the latter part of section 1 of the Charter to determine whether the CRTC, as the government authority seeking to uphold the restrictive regulation, can establish that it is i) reasonable; ii) prescribed by law; and iii) demonstrably justifiable in a free and democratic society.

As noted in the introductory comments to Chapter IV, the analysis involved in justifying government restriction of expression for the purpose of promoting equality is similar for each group intended to benefit from the regulation. Any considerations unique to particular minorities, to the extent that they arise at this stage of the discussion, will be examined separately.

Reasonableness is determined by reference to an objective test: the regulation must be both related to a legitimate government objective and not overbroad in its application in relation to that objective, and contain adequate and precise standards to allow a broadcaster to know with certainty what messages are and are not prohibited. The abusive programming regulation is clearly intended to further the legitimate objective of eliminating discrimination against minority groups. It is modelled on provisions in the Criminal Code[232] and Canadian Human Rights Act[233] which prohibit hate propoganda aimed at specified groups. This policy to promote equality in society has received statutory formulation in federal and provincial human rights legislation prohibiting discrimination in employment, lodging, the right to contract, and access to facilities

generally available to the public,[234] and has been constitutionalized in section 15 of the Charter. Constitutional and statutory instruments, therefore, indicate a clear concern that all groups have a right to equal treatment and opportunity. Abusive programming or that which tends to perpetuate stereotypes operates against this policy.

The next issue is whether the regulation contains standards which are precise enough not to have an inhibiting effect on non-proscribed expression. Broadcasters must understand, with sufficient particularity, what material does or does not fall within the regulation. Otherwise, they may be forced to withhold programming which approaches but does not in fact overstep the borderline.

The precise standards requirement may overlap with the section 1 test that the limitations be "prescribed by law" and "demonstrably justified". In the Ontario Film & Video case, as discussed in the first part of this chpater, the Divisional Court held inoperative those provisions of the Theatres Act which granted an unfettered discretion to the Ontario Film Board to censor films in the absence of any statutory or regulatory

standards to guide the Board in the exercise of its discretion. The internal guidelines which the Board followed in making its decisions were without legal force. The Court characterized the problem in that case as one of a lack of legal prescription, holding in effect that a legislatively authorized exercise of discretion by an administrative tribunal is not "law" within the meaning of the Charter.[235]

Applying the Ontario Film & Video analysis here, the present section 16 reposes a wide discretionary power in the CRTC to regulate standards of programs and character of advertising. The only term of reference in section 16(1)(b)(i) is section 3(d) of the Act which does not itself contain precise standards for the exercise of administrative discretion by the CRTC. Section 3(d) contains four basic directives: Programming must be varied and comprehensive, balanced, of high standard and of a high Canadian content. These directives are vague. Section 3(d) contains no guidelines as to what "high standard" means or, for that matter, how to define "varied", "comprehensive" and "balanced" programming, or programming which uses "predominantly Canadian creative and other resources". Section 4 of Bill C-20 proposes to amend section 16(1)(b)(i) by reposing additional power in

the CRTC to implement the objectives embodied in the proposed section 3(c.1). In my view these amendments, analyzed according to the Ontario Film & Video case, do not solve the lack of precise standards problem discussed above. Although the proposed amendment identifies the promotion of equality and dignity as one component of high standard programming, it does not articulate with any degree of specificity how this objective should be realized. It is unclear what the phrase "respect and promote the equality and dignity..." means in programming terms. For example, can blacks never be portrayed as nannies, maids and butlers? What about a program like "Benson" where the protagonist is a black butler who actually runs the Governor's office? Must war movies portraying Japanese and Germans as the bad guys and the classic cowboys against Indians westerns be banned? Must men and women both clean the floors in "Lestoil" commercials? What percentage of programming must address specific minority issues? What percentage of programming, for example, must show women as professionals as opposed to homemakers? Moreover, is it ever permissible to broadcast a program which makes a political statement about where a particular minority group or groups belong in society or even a political statement about a specific minority issue like busing or abortion?

While I believe that section 16 is vague and, for the reasons given later, overbroad in relation to its objectives, it is my opinion, for the reasons footnoted below,[236] that the section can be saved by and provide support for the enactment of regulations which meet section 1 Charter standards. It remains to apply that principle to the abusive programming regulation which was enacted pursuant to section 16 and which prohibits "any abusive comment that... tends or is likely to expose" certain specifically enumerated groups to "hatred or contempt".[237]

In Canadian Human Rights Commission v. John Ross Taylor,[238] Taylor challenged the constitutional validity of similar provisions of the Canadian Human Rights Act[239] on the basis that they infringe the freedom of expression guarantee in section 2(b) of the Charter. Section 13(1) of the Act makes it a discriminatory practice to communicate by telephone or other telecommunication facilities any matter that is "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination", including race or religion. Associate Chief Justice Jerome of the Federal Court Trial Division

upheld the impugned provisions as a reasonable restriction of the right to free speech. Although he did not specifically address the standards point, it is implicit from his upholding of the legislation that, in his view, section 13(1) contains sufficient standards to make the limitation on expression reasonable within the meaning of section 1 of the Charter.

Two recent cases in which the constitutionality of the obscenity provisions in section 159 of the Criminal Code were challenged may also be instructive on this issue. Section 159(8) of the Criminal Code defines as obscene any publication which has as its dominant characteristic the undue exploitation of sex, or such an exploitation combining sex with crime, horror, cruelty or violence. "Undue" is interpreted to mean that which exceeds the contemporary Canadian standard of tolerance.

In R. v. Wagner[240] the defendant sought to have section 159 of the Criminal Code declared to be of no force and effect as a violation of his right to freedom of expression under section 2(b) of the Charter. He argued that section 159 is "unreasonably vague, with the result that a well-intentioned citizen of common intelligence cannot determine what is required of him to enable him to

comply".[241] Shannon J. rejected this argument. Citing Judson J. in the pre-Charter case of R. v. Brodie,[242] Ferg J. in R. v. Ransingh[243] and Melvin Co. Ct. J. in R. v. Red Hot Video,[244] Shannon J. held that section 159 is not unusually difficult to understand or interpret. Although the judicially-created community standards norm is a relative and evolving test that is not easily applied, Shannon J. found that it is not too vague for the purposes of section 1 of the Charter.

Similarly, in R. v. Red Hot Video[245], two issues were considered by the British Columbia Court of Appeal:

(1) whether the definition of obscenity contained in subsection 159(8), and in particular the use of the community standards test, was so vague and overbroad as to violate the principles of fundamental justice guaranteed by section 7 of the Charter, and

(2) whether 159 is not a "reasonable limit" upon freedom of expression within the meaning of sections 1 and 2(b) of the Charter.

After a comprehensive review of the authorities, the British Columbia Court of Appeal upheld the

constitutionality of section 159 of the Criminal Code on both points. In the course of his analysis of the vagueness question, Anderson J. A. held that:

> ... while difficulties may arise from time to time in rare cases, making it difficult for a prosecutor, a policeman or a citizen to ascertain whether certain material does or does not offend against s. 159(8), the definition of obscenity enunciated by the Supreme Court of Canada, when read together with the decided cases makes it possible for any person to ascertain with reasonable certainty whether the material proposed to be published is or is not within the purview of s. 159(8). To give a precise definition is impossible. The law is not perfect. We cannot do perfect justice. The courts have, however, devised a reasonable workable standard in this area of law."[46]

It is submitted that the factors to be considered with respect to the vagueness issue are the same in the obscenity context as in the context of the abusive programming regulation. The underlying policy is the same, the language is similar and the standards contained in the regulation are no more vague than the undue exploitation of sex/community standards definition of obscenity in section 159(8) of the Criminal Code. Like the test for obscenity, the abusive programming prohibition is not unusually difficult to understand or interpret. It is true that in borderline cases it may be difficult to determine whether certain programming is or is not abusive within the meaning of the regulation.

However, generally speaking, it is possible for well-intentioned broadcasters of common intelligence to ascertain with reasonable certainty what is required of them to comply. The test is not perfect but it provides, in my submission, a reasonable, workable standard in this area.

In my submission, therefore, the regulation is both reasonable and prescribed by law[247]. It is specifically tailored to help fulfill the legitimate public policy of eliminating discrimination in Canadian society and contains standards which are sufficiently precise to allow broadcasters to know whether any proposed broadcast falls within or without the regulation's terms. On that reasoning, section 16(1)(b)(i) could be revived in either its present or amended form, despite a lack of adequate standards, to the extent of providing statutory authority for the abusive programming regulation. It remains to consider whether the regulation is "demonstrably justified in a free and democratic society".

The requirements that a restriction be reasonable and demonstrably justified overlap, but they are not coextensive: an unreasonable limit can never be justified, but sometimes a limit which is reasonable on an

objective test cannot meet the test of demonstrable justifiability. Furthermore, the standard of justification is not fixed. It shifts depending upon the nature of the right and the context in which it is asserted. This is indicated by Dickson J.'s comments about section 1 generally in R. v. Big M Drug Mart Ltd. where he said:

> "At the outset it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable - a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought to do so by impairing as little as possible the right or freedom in question".[248]

The abusive programming regulation is aimed at protecting the collective reputations of certain groups identifiable by race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It falls within the categories where government restrictions on free expression are prima facie legitimate, categories based on decency, public order, and the protection of certain public and private interests like reputation which are ennunciated in Canadian pre-Charter cases like Alberta Press.

The real question is whether an attack on the dignity and reputation of minority groups which falls short of a threat to physical safety, constitutes a sufficient danger to our society to justify this restriction on freedom of expression. There are two series of cases in the United States, dealing with the advocacy of lawless action and "fighting words", which would answer that question in the negative.

The test for constitutionally unprotected speech in the context of cases involving the advocacy of lawless action was first formulated in 1919 by Schenck v. U.S.[249] as whether the natural and reasonable tendency of the speech was to bring about a forbidden effect.[250] The United States Supreme Court in that case upheld a conviction on the basis that circulars to draftees about the unconstitutionality of the draft was sufficient evidence of an attempt by the defendant to interfere with the war effort by persuading recipients to refuse induction.

In Brandenburg v. Ohio,[251] the Supreme Court later refined the test, holding that the speech in question must be 1) "directed to inciting or producing imminent lawless action" and 2) "likely to incite or

produce such action". The Court therefore reversed the conviction of a Klu Klux Klansman under an Ohio statute which prohibited the advocacy of terrorism as a means of political reform.[252]

In the "fighting words" cases, where offensive speech is spoken before a hostile audience, the United States Supreme Court first propounded a fairly broad test holding unprotected, words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace".[253] More recent cases, however, have held that the words must have a direct tendency to cause the person to whom they are addressed to resort to violence.[254]

The cases involving group defamation are particularly instructive. In Beauharnais v. Illinois,[255] where the defendant had made defamatory remarks against blacks, the United States Supreme Court upheld a group libel law on the basis that defamatory utterances which are calculated to have a powerful emotional impact are not protected by the First Amendment. The Supreme Court has since given cause to believe that this test might be too broad. In National Socialist Party v. Skokie,[256] a neo-Nazi group chose to

march through Skokie, a predominantly Jewish town in Illinois. An injunction issued by the state trial court prohibiting the Nazis from, inter alia, "distributing pamphlets [that] incite or promote hatred against persons of Jewish faith or ancestry or hatred against any persons of any faith or ancestry, race or religion" was ultimately stayed by the United States Supreme Court on the ground that the injunction would deprive the petitioners of possible First Amendment rights for too long. Subsequently the town passed three ordinances one of which prohibited the dissemination of material which intentionally "promotes and incites hatred against persons by reason of their race, national origin or religion". The ban was invalidated[257] by the lower courts on the ground that the Beauharnais test was insufficient. Once again, the Supreme Court denied a stay of the ruling pending review.[258] Although the Supreme Court never actually dealt with the merits of whether this kind of speech is protected by the First Amendment, it indicated in these two separate instances that the Beauharnais decision may eventually be reconsidered.

It appears that in Canada the law may be moving in a different direction. In R. v. Keegstra,[259] the defendant, who was charged with unlawfully promoting

hatred against Jews, attacked in a pre-trial hearing section 281.2(2) of the Criminal Code of Canada as an unconstitutional infringement of his right to freedom of expression guaranteed by section 2(b) of the Charter. Quigley J., citing various Canadian pre-Charter material, as well as American jurisprudence, found at the first stage of analysis that the statute prima facie does not violate the Charter.[260]

Mr. Justice Quigley's analysis of the freedom of expression guarantee in the Canadian context is nevertheless instructive in weighing the right of free speech against the right of minority groups to be protected from wilfully promoted hatred for purposes of determining whether the limitation is demonstrably justified within the meaning of section 1. In the Keegstra case, Quigley, J. cited the preamble to the Canadian Bill of Rights[261] as an affirmation of the principles upon which the Canadian concept of freedom is founded, that is

> ...principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of the new and free institutions;... (emphasis added)

He then cited section 1 of the Bill which provides:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms..."

Finally, Quigley referred to section 27 of the Charter:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

He concluded that these principles, together with section 15 of the Charter itself, cannot rationally support an interpretation of freedom of expression which includes the freedom to publicly and wilfully promote hatred against a segment of Canadian society.

It is submitted that this reasoning is correct. Hate propaganda is an affront to the dignity and worth of the individual, is inconsistent with the preservation and enhancement of the multicultural heritage of Canada, and most importantly, fosters inequality and social strife in society. In addition, one may argue that when there is a conflict between the right to freedom of expression and another Charter right, in this case the right to equality, the standard of justification should not be as high as in the case of a limitation on ordinary political speech. As stated in the Report of The Special Committee on Hate

Propoganda in Canada (1966), which is regarded as the basis for s. 281.2(2) of the Criminal Code:

> If we do not maintain a society that is tolerant of vagaries and differences we shall not maintain individual freedom of expression and action; in such a situation constitutional guarantees will be of little avail...[262]

Furthermore, as stated in Chaplinsky v. New Hampshire:

> It has been well observed that such utterances are no essential part of any exposition of ideas and are of slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality[263]

Following the above reasoning, it is submitted that the test for upholding the constitutionality of restricting hate propoganda against minority groups should not be whether the expression presents a "clear and present" danger of violence or lawless action, but whether it presents a reasonable threat of perpetuating inequality in our society. In my submission, an abusive comment which "tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" contributes to discrimination and the perpetuation of inequality in Canadian society, and should therefore be restrained.

Alternatively, it can be argued that the clear and present danger test should be broadened to include the reasonable likelihood of future violence. At times of social stress or national crisis, hate propaganda or abuse directed at minority groups in democratic societies has in the past escalated into repression and even violence. The cases of the Jews in Nazi Germany and the blacks in the United States are obvious examples. This is ultimately the view adopted by Quigley J. in Keegstra:

> The effect of hatred on prospective converts can be serious. These effects have beer documented throughout history and are self evident. It does not take an expert in the field of psychology to inform the court that hate breeds hate. One has only to look at the major conflicts throughout history and the major racial uprisings and riots that have occurred. In my view, it is beyond doubt that breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and agression which leads to violence. Hatred is the antithesis of love. While the latter promotes good-will and unity the former is divisive and calculated to injure and ultimately destroy those against whom it is directed[264]

Quigley J. relied upon the following quotation at page 24 of the Report of the Special Committee on Hate Propoganda in Canada:

> ...In a democratic society freedom of speech does not mean the right to vilify... what matters is that insipient malevolence and violence, all of which are inherent in "hate" activity deserves national attention...the individuals and groups

> promoting hate in Canada constitute a 'clear and present danger' to the functioning of a democratic society. For in times of social stress such 'hate' could mushroom into a real and monstrous threat to our way of life...

Mr. Justice Quigley then discussed the ambit of section 281.2(2) of the Criminal Code and concluded that in light of the restrictions on operation and defenses built into the section, the limitation on freedom of expression is very slight when compared with the harm which results from hate propoganda. This is an important consideration to bear in mind with respect to the abusive programming regulation. It is submitted that the broadcasting regulation would withstand constitutional scrutiny more easily if it incorporated some of the defenses found in section 281.2(2) of the Criminal Code.

The reasoning in the Taylor case,[265] discussed earlier,[266] was inadequate on the issue of proportionality. Jerome A.C.J. stated that it is "beyond question, as a matter of principle, that freedom of speech must give way to certain restrictions and one of them must be upon the use of it to incite hatred or contempt upon racial grounds"[267] and that "communications which have as their purpose incitement of racial hatred are unacceptable in Canadian society".[268] Nowhere did he actually discuss the dangers of such communications and

then balance them against the right to freedom of expression. Clearly, however, the Federal Court, Trial Division was also unwilling to find that this kind of legislation constitutes an impermissible restriction on freedom of expression.

In conclusion, it is submitted that, for the reasons offered in Keegstra, the dangers of hate propoganda directed at minority groups outweigh those flowing from a limitation of the right to freedom of expression guaranteed by the Charter. Therefore, the CRTC's abusive programming regulation can be demonstrably justified in a free and democratic society. This is particularly so when, as here, the regulation is in respect of the broadcast media. Broadcasting arguably has a disproportionate effect upon listeners and viewers, as argued in the previous chapters, as well as a potentially greater intrusive effect. The abusive programming regulation, particularly as applied to broadcasting, furthers a legitimate state objective to eliminate discrimination against certain groups in society by prohibiting comments which incite hatred or contempt against those groups. Moreover, the regulation contains adequate standards to ensure that it does not also restrict legitimate speech.

i) Prohibition Against Sexually Abusive Programming

The principles discussed above which pertain to the constitutionality of the abusive programming regulation in general apply *mutatis mutandis* to the prohibition against sexually abusive programming in particular. Certain additional observations, however, should be made.

First, sexual equality as a public policy has been accorded special consideration. Not only is sex included in the general equality provision in section 15 of the *Charter* but it is the specific focus of section 28 which provides:

> notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Section 28, unlike section 15, is the only equality guarantee which neither Parliament nor the provincial legislatures may opt out of pursuant to section 33(1). There is, therefore, a specific constitutional imperative to promote equality of women which must be balanced against the freedom of expression guarantee in section 2 of the *Charter*.

Second, there is already trial level and appellate support for the view that the dangers of obscenity, a form of sexually abusive material, are sufficiently serious and proveable that obscenity restrictions are valid notwithstanding section 2(b) of the Charter. In R. v. Wagner,[269] Shannon J. accepted the evidence of one expert witness who testified that "both sexually violent pornography and degrading and dehumanizing pornography convey the message that women enjoy abusive and antisocial behaviour". He contended that repeated exposure to such material leads men to become more sexually aggressive in their relations with women and more tolerant of aggression in others. As a result, men become callous and less receptive to the concept of sexual equality. Similarily, Chief Justice Nemetz, in R. v. Red Hot Video[270] observed that undue sexual exploitation of women and children can lead to "abject and servile victimization". In the same case, Anderson, J.A. expressed the view that sexually abusive material constitutes a threat to society because it has "a tendency to create indifference to violence insofar as women are concerned".[271] Ultimately, he held, this constitutes a threat to the guarantee of equality to both sexes enshrined in section 28 of the Charter, since violent and degrading material "creates a social climate

encouraging men to act in a callous and discriminatory way towards women".[272]

It should be noted that these judgments run together two possibly separate justifications for regulating obscene or sexually abusive material; that is, the link between obscenity and violence toward women, and the threat to sexual equality in society from this type of expression.

It is by no means universally accepted that there is a real relationship between sexually abusive material and violence toward women. The Special Committee on Pornography and Prostitution, chaired by Paul Fraser, was constituted by the Federal Government in June, 1983 to study the problems associated with pornography and prostitution from a socio-legal perspective. Among the Committee's specific terms of reference was a direction to consider the effects of pornography. The Committee's Report[273] explored both the alleged link between pornography and violence and the relationship between pornography and social equality to assess their validity as justifications for restrictions on pornographic material.

As to the former, the Committee, after an exhaustive review of the literature and extensive public hearings found that despite a considerable volume of research in the last fifteen years, one cannot draw firm conclusions about whether pornography increases the incidence of violence towards women[774]. Notwithstanding individual studies which demonstrate harmful results from pornography, the research taken as a whole was found to be contradictory or inconclusive due to different operating definitions of pornography, an inadequate level of consistency in the results of different experimental situations, and the existence of few attempts to integrate research findings into a more systematic, explanatory system. Moreover, the Commission observed that the research was typically designed to address short term rather than long term cumulative effects of pornography. Furthermore, due to mechanical and ethical difficulties in testing, the research did not consider the impact of pornography on children or those already predisposed toward violent behaviour. In any event, the Commission found that studies of sexual crime or sexually anti-social behaviour did not isolate pornography as a causal as opposed to coincidental factor. Finally, purely statistical attempts to correlate the increased availability of pornography with an increase in sex crimes

was also found to be fraught with difficulties such as inconsistent definitions and under-reporting of sex crimes, and inconsistent evidence documenting the increased availability and use of pornography. Therefore the Commission was unable to find that pornography is a significant causal factor in the Commission of violent crime, sexual abuse of children or the disintegration of communities and society.[275]

The Commission did, however, adopt the second justification for restriction pornography which holds that pornography undermines the fundamental values of Canadian society. By portraying women in a sub-human, demeaning and subordinate fashion, it particularly undermines the right to equality guaranteed to women by sections 15 and 28 of the Charter.[276] This approach essentially places the burden upon those championing free speech as a priority to demonstrate that pornographic messages which have little intrinsic value do not harm the equality principle. Accordingly, the Commission's proposals for reform are made on the basis of a perceived need to promote an egalitarian society and an improvement in the status of women. This approach relies less upon hard evidence, of which there is little in any event, and more upon the notion that equality is an equally fundamental

value in Canadian society as freedom of expression. This is, of course, reinforced by the presence of sections 15 and 28 in the Charter.

It is submitted that the Fraser Committee's approach is a valid justification for the regulation of sexually abusive programming. There is already judicial support as well, in Keegstra, Wagner and Red Hot Video for the view that the equality values expressed in section 15 and 28 of the Charter, as well in the Canadian Bill of Rights and Canadian federal and provincial human rights legislation take precedence over the right to freedom of expression in the context of obscenity or sexually abusive material.

ii) Prohibition Against Programming Abusive of Minorities Distinguished by Race, National or Ethnic Origin, Colour and Religion

There has also been judicial support for the view that expression which promotes hatred toward identifiable minorities may be restricted. In Canadian Human Rights Commission v. Taylor, discussed above,[277] the Federal Court Trial Division upheld a provision of the Canadian Human Rights Act which prohibits communications by telephone or other telecommunication facilities likely to expose persons identifiable by, inter alia, race or

religion to hatred or contempt. Although Jerome A.C.J. failed to give comprehensive reasons for his views, the case of R. v. Keegstra, also discussed previously[278] is more explicit. The legislation under attack in that case was section 281.2(2) of the Criminal Code which is similar to the abusive programming regulation in its prohibiton of hate propaganda directed at minority groups. As already noted, the statute was upheld as a constitutional limitation on free speech on two grounds, that the reasonable likelihood of such expression escalating to violence under adverse circumstances and the undermining of equality in Canadian society caused by hate propoganda.

There have been two recent studies commissioned on hate propoganda. In March 1984, Patrick D. Lawlor submitted his report on Group Defamation[279] to the Attorney General of Ontario. Although the report does not explore in any depth the constitutional justifications for a limitation on this kind of expression, Lawlor rejected the "clear and present danger" test as the sole test and acknowledged the need to protect the equality and dignity of groups disadvantaged by their minority status as a rationale.[280]

The Special Committee on Racial and Religious Hatred was struck by the Canadian Bar Association in

February 1984 to consider amendments to strengthen the hate propoganda provision in section 281.2 of the Criminal Code of Canada and to consider further measures to combat the incitement of racial and religious hatred. In its Report,[281] the Committee considered several arguments both opposed to and in favour of anti-hatred legislation. The opposition argued on the one hand, that hate-mongers present no immediate threat of violence to the groups they attack as per the "clear and present danger" test which they believed should be adopted under the Charter.[282] The proponents argued that this should not be the sole applicable test since the Charter, unlike the American Bill of Rights, specifically entrenches equality rights in section 15 and provides in section 27 for the application of Charter so as to take into account the multicultural character of Canada.[283]

Ultimately, the Committee took the position that the legislative restriction of freedom of expression in the context of hate propoganda was justified in order to enhance Canada's multicultural heritage and the inherent dignity of the individual and to foster a climate of mutual respect.[284] It is interesting to note that the Committee specifically recommended an amendment to the federal and provincial human rights codes "prohibiting

publication of statements which create an unreasonable risk that an identifiable group will be exposed to violence or hatred or which constitute an unreasonable affront to the human dignity of a person belonging to an identifiable group".[285] This recommendation therefore, embodies the two justifications relied upon by Quigley J. in R. v. Keegstra of first, a reasonable likelihood of future violence toward groups targeted by hate propoganda and second, a fostering of inequality and social strife in Canadian society. No studies have been cited by in the jurisprudence or these reports to support the proposition that there is a reasonable likelihood that hate propaganda will incite racial and religious violence or that such speech may foster and promote inequality and undermine human dignity. However, one may argue, as did the Canadian Bar Association Committee, that the presence of sections 15 and 27 in the Charter is sufficient to justify this sort of restriction on hate propaganda. I believe that this approach is correct, and that our different constitutional arrangements make the American "clear and present danger" test inappropriate for Canada.

3) Prohibition Against Minority Stereotyping

The equality objectives expressed in the proposed amendment to the Broadcasting Act arguably call for

regulation of stereotyping of identifiable minorities which falls short of that proscribed by the abusive programming regulation discussed in the previous section. The Task Force on Sex-Role Stereotyping in the Broadcast Media,[286] in its report "Images of Women"[287] recommended that the industry implement a voluntary, self-regulated scheme to eliminate sex-role stereotyping in programming. One licensee, CKVU Television, has already been censured by the CRTC for failing to follow the guidelines outlined in the Report.[288] I propose, in this section, to discuss the regulation of sex-role stereotyping in broadcasting as prototypical of minority stereotyping in general and apply the industry's experience there to any future attempts to control the stereotypes which are enumerated in the proposed section 3(c.1). The Task Force Report "Images of Women" and the difficulties encountered by the industry in implementing that report raise general policy issues and therefore provide an excellent case study for this portion of the analysis of the equality provision in Bill C-20.

i) The Task Force on Sex-Role Stereotyping in Broadcasting and its Report "Images of Women"

The mandate of the Task Force was to formulate guidelines and standards to encourage the elimination of

sex-role stereotyping and promote a more positive and realistic portrayal of women in the broadcast media. The Task Force concentrated on stereotyping which perpetuates images of women as economically dependent homemakers and mothers, as secretaries, clerks, nurses, teachers or employees in other "female" occupations,[289] and as lures and decorative objects.[290] It found that continued stereotyping of women contributes to sex discrimination,[291] a problem of concern to all Canadians. It should be noted that the Report distinguishes sex-role stereotyping from sexually abusive programming. Specific examples of this distinction are noted below. The bottom line of the Report is the recommendation to the CRTC that it implement a system of self-regulation for the broadcasting and advertising industries during a two-year period. The principal recommendations are as follows:

1. that the CRTC periodically monitor broadcast commercials and programming for sex-role stereotyping, obtain progress reports from the industry committees responsible for self-regulation, as well as from individual licensees, institute a mechanism for processing public complaints received by the CRTC and the Government and publish a report at the end of two years.

Note that the Task Force formally asked the CRTC to eliminate abusive representations of either sex, as well as the portrayal of gratuitous violence against women in broadcast content. This was presumably because the broadcasting regulations originally prohibited broadcasting abusive of race or religion (or creed) only. The Task Force request was unltimately fulfilled when the CRTC passed the new amendment to the regulations prohibiting sexually abusive programming. Here, then, is one instance where abusive programming is distinguished in the Task Force Report itself from less offensive forms of sex-role stereotyping.

2. that the Government ensure a more balanced representation of women on the CRTC and the CBC Boards of Directors, establish a system to process public complaints and measure the progress made to eliminate sex-role stereotyping in broadcasting.

3. that the CBC continue its efforts to eliminate employment discrimination and sex-role stereotyping in programming and commercials, and periodically report on the progress made.

The CBC has followed up this request by adopting guidelines with respect to the portrayal of sexes in programming (December 1979)[292] and advertising (June

1980)[293], and has adopted a set of language guidelines both in English and French (Spring 1980)[294], as well as a specific policy on stereotyping (June 1980).[295]

4. that the Canadian Association of Broadcasters (CAB) amend its Code of Ethics to include clauses on human rights and sex-role stereotyping.

The CAB has fulfilled this request. It established a special standing committee on sex-role stereotyping in April 1981 to implement the recommendations of the Task Force. This committee is responsible for the education of the private broadcasting industry and for processing complaints in relation to stereotyping. In November 1982, the CAB approved the following amendments to its Code:

> CLAUSE 2 - HUMAN RIGHTS
>
> Recognizing that every person has a right to full and equal recognition and to enjoy certain fundamental rights and freedoms, broadcasters shall endeavour to ensure, to the best of their ability, that their programming contains no abusive or discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, marital status or physical or mental handicap. (emphasis added)
>
> CLAUSE 10 - SEX-ROLE STEREOTYPING
>
> Recognizing that stereotyping images can and do cause negative influences, it shall be the responsibility of broadcasters to exhibit, to the best of their ability, a conscious sensitivity to the problems related to sex role stereotyping, by refraining from exploitation and by the reflection of the intellectual and emotional equality of both sexes in programming..(emphasis added)

The CAB, therefore, has also separated abusive programming in clause 2 from sex-role stereotyping in clause 10. In addition, it has adopted voluntary guidelines on sex-role stereotyping which include a recognition of the need for sensitivity to sex-role stereotyping problems and a recognition of the changing interaction of men and women in today's society. The guidelines acknowledge that broadcasting should portray a contemporary family structure, in which roles are not strictly divided along the lines of sex, reflect the intellectual and emotional equality of the sexes, avoid sexist language, achieve a realistic balance in the use of men and women as voice overs and experts, and attempt to increase the visibility and involvement of women both on and off the air.[296]

5. that the advertising industry continue its program of self-regulation.

The industry (CAAB - Canadian Advertising Advisory Board) has followed up this request by amending the Canadian Code of Advertising Standards to include clause 15 which provides as follows:

> 15. Taste, Opinion, Public Decency
>
> a. As a public communications process, advertising should not present demeaning or

derogatory portrayals of individuals or groups and should not contain anything likely, in the light of generally prevailing standards, to cause deep or widespread offence. It is recognized, of course, that standards of taste are subjective and vary widely from person to person and community to community and are, indeed, subject to constant change.

b. The authority of the Code and the jurisdiction of the Council are over the content of advertisements. The Code is not meant to impede in any way the sale of products which some people, for one reason or another, may find offensive -- provided, of course, that the advertisements for such products do not contravene section a. of this Clause.

The CAAB has also developed nine positive action statements with respect to sex-role stereotyping which were presented to the Task Force on July 31, 1980. These statements are similar to the CAB guidelines and also provide that advertising should reflect, inter alia, the

changing roles of the sexes in today's society, a contemporary family structure and, the intellectual and emotional equality of the sexes. Furthermore, advertising should avoid portraying any excessive dependence on products or services, and refrain from exploiting men or women for attention-getting purposes without ensuring that their presence is relevant to the advertised product. Finally, advertising should use non-sexist language, portray both men and women as buyers and decision makers for major items and services, and use more women as voice-overs and experts.[297]

The CAAB has committed itself to an implementation plan to promote awareness of the positive action statements. It has established an Advisory Committee on sex-role stereotyping to process complaints and develop both a sensitization and a research program for the industry. The plan is well under way. An educational film, "Women Say the Darndest Things" has already been produced and exhibited to industry members.

The CRTC, in its public notice of September 16, 1983,[298] stated that it was in the process of acting on the Report of the CRTC Task Force. The notice announced the end of the first year of self-regulation and required

all licensees "to submit a report on the initiatives they have taken to deal with the problem of sex role stereotyping". The Commission requested information on the licensee's methods of handling complaints, and sensitization programs and seminars arranged or attended.

At present, the CRTC is studying the reports submitted by broadcasters pursuant to the public notice of September 1983, as well as the state of the Canadian broadcasting industry as a whole on the issue of sex-role stereotyping. A summary report is expected to be published by the Commission some time this year. Meanwhile, the broadcasting and advertising industries appear to be taking the Task Force guidelines very seriously. The spectre of license renewal hearings imbues the "recommendations" with great persuasive power. Nevertheless, dissatisfaction with self-regulation has prompted the CRTC to pass the regulatory prohibition against sexually abusive programming. Regulations drafted broadly enough to cover sex-role stereotyping may be in the offing as well.

Many of the concerns addressed by the Task Force report are applicable to the portrayal of all identifiable minorities in broadcast programming. Any scheme to

eliminate minority stereotypes will seek to identify typically demeaning or derogatory assumptions and prejudices, and promote more positive portrayals of minority groups. For example, portrayals of blacks as subservient to whites, as domestics and porters or as capable of independently entering the white world only as blues singers and soft shoe shuffflers would be unacceptable. Such scheme would oblige licensees to cast more blacks in traditionally white roles, as educated members of the middle class, as lawyers, doctors, teachers and as buyers and decision-makers in commercials. Jews could not be portrayed in stereotypical roles as avaricious money lenders or landlords. Moreover, licensees would be obliged by any regulatory scheme to address minority concerns, avoid pejorative slang such as "nigger", "coon", "kike", "mick", and increase the visibility of minorities both on and off the air, as experts, voice-overs, producers, writers, and directors.

Laudatory though the objectives of these regulatory schemes may raise troubling questions in practice. Does such regulation amount to paternalism, a vehicle to protect people from themselves?[299] Who decides how minorities should be portrayed? There are those who may honestly believe that certain groups should

or should not play designated roles in society?[300] Should programming and advertising reflect the status quo or promote change?[301]

Furthermore, stereotyping is sometimes a legitimate form of communication. It has existed throughout history as a means of expressing ideas in art and culture. Not all stereotyping is negative. Moreover, it is difficult to set standards to distinguish between legitimate stereotyping and that which stigmatizes particular groups and lacks any redeeming social or artistic value.

These concerns have serious constitutional and policy significance. Any movement to limit the freedom of expression now guaranteed by the Charter, whether by formal regulation or threat of government (CRTC) intervention at licence renewal time[302], must be demonstrably justified by the governmental authority seeking the limitation.[303]

ii) Constitutional and Policy Implications of the Sex-Role Stereotyping Guidelines and other Forms of Minority Stereotyping Regulation

Because restrictions on sex-role stereotyping are prima facie restrictions on the freedom of expression

guaranteed by section 2(b) of the Charter, the onus is on the CRTC to demonstrate pursuant to section 1 of the Charter that the censure of a licensee on the basis of voluntary guidelines or formal regulation furthers a legitimate public purpose sufficiently precise to enable a broadcaster to know in advance whether the scheme will be violated by a particular emission, is proportional to its objectives. Restated, the CRTC must show that they do not disproportionately infringe upon broad areas of protected expression.

Applying the above to the Task Force guidelines, the evidence before the Task Force was that sex-role stereotyping handicaps society by influencing men, women and children to limit their social and professional horizons, and that, therefore, there is a direct relationship between sex-role stereotyping and sexual discrimination. Since it is in the public interest to maximize the contributions of all society's members, the Task Force concluded that men and women should be portrayed in a variety of roles. Therefore the sex-role stereotyping guidelines further a legitimate government policy.

It is submitted that any attempt to regulate stereotyped portrayals of the minority groups enumerated

in proposed section 3(c.1) would further the legitimate public purpose of trying to eliminate discrimination against identifiable minorities. This policy, again, is evident in section 15 of the Charter and the Canadian human rights legislation; all groups have the right to equal treatment, with dignity and respect.

The matter of setting precise standards is a far more difficult stumbling block. Section 17 of the Broadcasting Act grants absolute discretion to the Executive Committee of the CRTC to issue, amend, renew and suspend broadcasting licenses in furtherance of its objects; that is, to regulate the industry in accordance with section 3 of the Act. Section 17 contains no standards, the only specific reference being to the broadcasting policy outlined in section 3. Sections 3, as it stands now, merely enunciates general directives for the industry without any precise standards. According to the reasoning of the Court of Appeal in the Ontario Film & Video case, the absence of standards renders the licensing power in section 17 ultra vires, beyond the possibility of revival by properly drafted regulations. I shall assume that the Divisional Court's approach was correct that properly drafted regulations would cure the deficiency.[304]

The problem with informal guidelines or policy directives, however, is that they do not have the legal force of regulations. Therefore, even if they embodied adequate standards, they could not save section 17, pursuant to the Divisional Court's reasoning in Ontario Film & Video. Any scheme to eliminate minority stereotyping, based on sections 3 and 17 as presently enacted, would have to be passed as regulations pursuant to section 16.

As already discussed in Chapter II of this paper, the enactment of the proposed section 3(c.1) of the Broadcasting Act would not in and of itself incorporate precise standards into section 17. Section 3(c.1) articulates one general aspect of high standards in programming, that is the respect for and promotion of the equality and dignity of identifiable minorities. It gives no directions, however, as to how that objective is to be realized by individual broadcasters. This would be the function of any regulation passed thereunder. The question which remains is whether such regulations could be drafted to revive sections 3 and 17 of the Broadcasting Act and pass section 1 Charter muster. I propose now to look in some detail at the sex-role stereotyping guidelines by way of a case study on the type of

regulations likely to be passed under any scheme for the elimination of minority stereotyping in programming. The problems arising with respect to standards in the context of sex-role stereotyping are likely to be the same in the context of other kinds of stereotyping, as well.

The basic recommendations of the Task Force on sex-role stereotyping have been outlined on pages 145-48 of this paper. Basically these recommendations include directions to the CRTC to monitor broadcasting for sex-role stereotyping, supervise industry efforts at self-regulation and process public complaints, as well as directions to broadcasters and advertisers to continue self-efforts to eliminate sex-role stereotyping.

Although they are very general, the Task Force recommendations are based on a number of concerns and suggested solutions which it outlined in great detail.[305] They include the following: First, broadcasting should reflect the diversity of women in Canadian culture by portraying women of all ages, ethnic groups and physical appearance, and as involved in varied activities including athletics. Broadcasters should not, however, portray women as sexual lures or in other demeaning ways. Second, language should be non-sexist and

should refer to women not just in terms of physical appearance, but in the context of their accomplishments. Third, women should be presented realistically in a variety of roles, including that of the expert, and not just as the traditional homemaker. Moreover men and children should be portrayed as participating in household tasks. Fourth, broadcasting should reflect the present diversity in modern life by portraying single parent and extended families, and relationships in which women are not subservient to or dependent upon men. Fifth, women should not be portrayed as excessively concerned with sexual attractiveness, beauty, aging, cleanliness or "catching" a man. Nor should women be portrayed negatively as "catty", submissive, incompetent, unintelligent and incapable, but rather as decision-makers contributing significantly to society. Sixth, with respect to programming specifically, women should be more adequately represented as newscasters, reporters and hosts. Women's events, issues of particular concern to women, women's perspectives or issues of general interest, as well as women's contributions in various fields of endeavour, including sports, should receive coverage. A balance of male and female perspectives should be represented in drama, variety, comedy and children's programming. Seventh, with respect to radio, music with

violent, sexist and racist material should not be played, and radio broadcasters should avoid language and images which are sexist and demeaning to women. Women artists and composers, disc jockeys and program hosts should be more adequately represented. Eighth, commercials should fairly reflect the fact that women buy a full range of products and services, and are not the exclusive buyers and users of home products. Women should not be presented in desperate need of products to satisfy their adult companions or children, nor should personal products like cosmetics, jewellery and clothing be presented as a means to catch or please a man. Moreover, women should be better represented as experts, voice-overs and announcers, and as selling a wider range of products and services, instead of exclusively those assumed to be for women. In particular, feminine hygiene advertising should be dealt with in a sensitive manner. Pornography or portrayals of violence against women, which constitute the ultimate expression of the male dominance/ female submissiveness stereotype in our society, have no place in broadcasting.

These recommendations form the core of the present system of industry self-regulation in the matter of sex-role stereotyping. They have essentially been incorporated by the CBC, the CAB and the CAAB in their

internal guidelines on sex-role stereotyping. For example, the CBC Language Guidelines cite specific examples of "man-words" which should be avoided and substituted by sexually neutral language.[306] The guidelines adopted by the CAB[307] refer specifically to, inter alia, the need for broadcasters to portray all family members as equal participants in family life and home management, and to use both men and women as experts and voice-overs. The CAAB guidelines[308] recognize, inter alia, that advertising should reflect the broad range of occupations for men and women alike, eliminate sexist language and portray women as buyers of major items and services.

The guidelines are comprehensive and detailed about the various aspects surrounding the representation of women in broadcast programming and advertising. They prohibit certain kinds of language and portrayals of women, and dictate other acceptable forms of presentation. Nevertheless, as an attempt to regulate sex-role stereotyping, the guidelines are, in my opinion, too vague. There are no standards as to what percentage of programming and advertising must be devoted to fulfilling the various positive obligations concerning how women are to be represented in broadcasting. For example,

how many programs or commercials should present women as career people instead of homemakers, as pilots rather than stewardesses? What percentage of experts, newscasters, reporters, program hosts and voice-overs should be women? What constitutes adequate coverage of women's issues or women's perspectives on issues of general interest? How much representation of women artists and composers on radio is "better"? How many women should be portrayed as buyers and sellers of big ticket, non-household items? Words like "wide variety", "more balanced", "more realistic", "not always" or "not only", "more adequately", "fair and equitable", "better represented", "also" and "as well as" are simply too vague to constitute adequate standards for these purposes. Broadcasters and advertisers may decide to avoid completely portraying women in traditional roles, for example, for fear of violating the vague guidelines and risking the non-renewal of their licenses. It is submitted, therefore, that the guidelines in regulation form would not contain sufficiently precise standards to revive section 17 of the Broadcasting Act and would therefore fail both the reasonableness and legal prescription[309] requirements in section 1 of the Charter.

In my view, any set of regulations designed to eliminate stereotyping is bound to suffer the same

deficiencies. It is not enough, for example, that regulations require programming to reflect the diversity of roles and occupations in society pursued by members of various races, ethnic groups, religions and ages, and even by the handicapped. Nor is it acceptable that they simply require more adequate representation of minorities in expert or anchor-type roles, as newscasters, program hosts, voice-overs and announcers. Such regulations must quantify in percentage terms the type of programming required. Failing this kind of specificity, broadcasters may resort to self-censorship and refrain from legitimate expression which they fear might violate programming guidelines.

The problem is how the CRTC can possibly quantify the amount of programming required to meet stated equality objectives. How many black program hosts, for example, is enough to promote the equality of blacks in Canadian society? It is submitted that any such determination would be completely arbitrary and would effectively cast the CRTC rather than the broadcaster in the role of programmer. This, in my opinion, is undesirable from a policy point of view. The CRTC, as a regulatory agency, should not be in the broadcasting business. On a practical level, there is a danger that the CRTC will

become immersed in programming decisions at the expense of its other numerous and substantial regulatory duties. A more serious consequence is that the CRTC might fashion broadcasters in its own image, reaching deeply into all aspects of programming to scripting, casting, editing, production and so on. It should impose a disproportionate limitation on the right to freedom of expression in order to promote equality objectives.

To illustrate, let us assume that the CRTC promulgated a regulation which codified the Task Force guidelines on sex-role stereotyping. In my view, such a regulation would give the CRTC a disproportionate power in relation to the equality objective. Virtually any moral, political or religious expression which deals with or portrays women potentially falls within its ambit.

Some programs which contain sex-role stereotyping material do so simply to express a philosophy about how society should be ordered. For example, a program about a male dominated society may have as its theme the political view that women are unable to function competently in government. Others may express the view that an all-male army is in the national interest or, as in the closing days of President Carter's Administration in the United

States, that only males should be subject to the draft. While many would disagree strongly with these views, they are seriously held and make a legitimate contribution to the public debate. More importantly, it is precisely this form of political speech which section 2(b) of the Charter was meant to protect. The guidelines on sex-role stereotyping are not confined within narrow limits, as is the abusive programming regulation, but rather cover a broad spectrum. Even the Bible, assuming it was in broadcast form, would be proscribed given its clear message about the role of women in society. It is submitted, therefore, that the ambit of the guidelines would have to be substantially narrowed, as in the abusive programming regulation, to cover only a defined range of utterances.

Similarly, some areas of racial stereotyping are legitimately debatable even if some find them objectionable. One should be entitled to question the value of affirmative action programs or busing of school children in order to achieve full integration of the educational system. Programming on these issues constitutes legitimate political speech which may be put at risk by comprehensive anti-stereotyping regulation.

Furthermore, it may be impossible to draft narrower regulations. For example, how would one draw regulations which eliminate "bad" stereotyping but would still allow the Merchant of Venice to be aired notwithstanding its portrayal of the Jewish Shylock? Would Gone with the Wind be prohibited because of its stereotyping of blacks as servants? Would they prevent the broadcast of an "All in the Family" program which features a bigoted Archie Bunker as its main protagonist? When the program first appeared on the air, any liberal viewers were outraged by Archie's prejudices. Only in time, did it eventually become clear that Archie was meant to be the vehicle through which the illogic and unfairness of bigotry were exposed to the audience. To enforce anti-stereotyping regulations which fall short of the abusive, the CRTC would surely find itself in the role of a censor delving into plot lines, characters and themes to determine whether the expression at issue is or is not legitimate. It is submitted that this function would be undesirable from both a public policy and consitutional perspective.

Finally, certain problems with respect to minority stereotyping can be solved by means which fall short of an outright prohibition on expression. For

example, in the case of an editorial, documentary or news-type program, Part III of the BBG White Paper would provide a right of reply as a viable and effective alternative. If an editorial stated that women should be kept barefoot, pregnant and in the home, then Media Watch or another woman's group could simply counter-attack on the air, at the licensee's expense.[218] Thought might even be given to allowing the person with the right of reply more time than the original speaker had, therefore providing the broadcaster with an incentive to review his stereotyping content. If the government objective is to ensure that people have a true perception of their potential, then the answer is not to suppress stereotypes in the context of editorials or commentary, but to allow the victims to respond directly and educate the public to their views. It is submitted that in most cases, there is not the same degree of affront to human dignity in an ordinary stereotyping situation which might mitigate in favour of a prior ban on speech as in the case of an abusive comment designed to promote hatred or contempt.

The problem of viable alternatives to the suppression of offending speech is more difficult in the case of entertainment programming and advertising. In the context of sex-role stereotyping in the United States, the

FCC has specifically refused to apply the fairness doctrine where the stereotyping is only incidental to the broadcast message.[311] No such distinction appears in the White Paper or in any CRTC ruling or policy statement. Presumably, then, representatives from women's groups could insist they be given an opportunity to respond to any program or commercial which contains sex-role stereotyping material.

The difficulty is that, where such material is merely incidental to the broadcast message, the audience is preoccupied on a conscious level with, for example, the plot of the program story or with the product to be sold. It would be difficult, and perhaps impossible to create standards for determining when a right of reply should or should not be available in entertainment or commercial advertising broadcasts in most ordinary situations. Does the fact that a woman is washing the floor in a Lestoil commercial give the National Organization for Women a free right of reply? If it did, the enormous financial implications would effectively neuter much of current broadcasting. Such a broad right of reply would, it is submitted, tilt the balance too heavily in favour of equality, even in minor matters, at the expense of vigorous free speech.

Because of society's very high sensitivity to discrimination against traditional victims such as blacks and Indians, it might be easier in many instances to isolate and identify incidental stereotyping of these minorities and to create standards for determining when a right of reply should be available. It is submitted, nevertheless, that such a right of reply would be inappropriate in a majority of cases and would create an undue financial hardship on licensees. For example, the NAACP should not be entitled to claim a right of reply to every program or commercial which does not portray blacks as professionals as opposed to labourers or as employers as opposed to employees. Clearly a right of reply cannot solve the problem of inadequate representation of minorities as experts, program hosts and voice-overs. Regulations would have to be passed setting forth the exact percentage or range of programming required to fulfill the various positive obligations on broadcasters. The same is true of requirements that broadcasters present minority issues and events, and minority perspectives on issues of general interest. A general obligation on licensees to present "balanced" programming in section 3 of the Broadcasting Act and in the White Paper is simply too vague to enforce in these circumstances.

In the United States, a concern for balanced programming is the focus of the Community Ascertainment Program which was discussed in the last chapter. As part of this program, broadcasters have been obliged to interview minority group leaders in order to determine minority needs and interests and then to program a response to those concerns. As already observed, however, the Community Ascertainment Program has not been successful. It has been undermined mainly by the absence of a clear definition of what constitutes responsive programming. Licensees can broadcast "responsive" programs which only tangentially address minority issues, or even programs which are of general interest to minority and non-minority viewers alike. Moreover, there are no rules as to when these programs must be scheduled. In the case of radio broadcasting,[312] licensees may even take programming of other stations in the same market into account when deciding upon which issues to address, resulting in an effective segregation of minority channels from the mainstream. It is submitted that a Community Ascertainment Program would not ensure the adequate presentation of minority concerns by Canadian broadcasters without more detailed and precise standards.

Another alternative, positive government incentives such as funding and favourable tax treatment to

those licensees who institute programs to eliminate stereotyping, is subject to the same adequacy of standards problem. Furthermore, such incentives are no less restrictive than the guidelines because they too amount to the restriction of expression through government action.

In summary, a right of reply constitutes a less restrictive and, in my opinion, a more effective means to regulate stereotyping which appears in the context of an editorial or commentary. In the case of entertainment programming or advertising, a right of reply would not in many cases be viable. Specific standards are required to establish the percentage or, at least, a range of a licensee's programming which must be directly responsive to minority concerns, including the representation of minorities in heretofore minority-dominated roles in broadcasting and the presentation of minority issues.

In the entertainment and advertising field, the absence of a less restrictive alternative to outright prohibition of stereotypical material does not necessarily mean that that prohibition is valid. For the reasons previously given, there is a great danger that freedom of expression will be excessively infringed for relatively minor gain. A better way to deal with the problem in the

entertainment context is through the expenditure of government resources to educate the public. The state should use the public network, for example, to change people's taste. It is to be hoped that as more people are educated to the problem by minority interest groups and organizations, newspaper coverage of minority issues, books, magazines, lectures, rallies and so on, the demand for more balanced programming will increase. Advertisers wishing to sell products will have to cater to that audience, thereby creating further incentives for balanced programming. Admittedly, this will be a slow process.

There are signs, however, that the process has begun. Programs like "Hill Street Blues" and "Cagney and Lacey" feature women police officers while "Kate and Allie" and "Who's Boss" focus on the plight of single parent familes. Moreover, in "Who's Boss", the housekeeper is male. "Dynasty" and "Falcon Crest", despite high camp, portray women who are powerful in business with traditionally "male" characteristics of aggressiveness and toughness. For the middle aged and elderly viewing audience, shows like "Golden Girls" and the "Equalizer" portray over-sixty characters as vital, attractive and dynamic members of society. A new genre of situation comedy typified by "The Bill Cosby Show" and the

copycat "Charlie & Company" focus on black families in everyday life situations with problems universal to middle class Americans of every colour and persuasion and with no distinguishing black characteristics to speak of. Many of these shows would have been unimaginable even as recently as ten years ago.

To conclude, I would argue that as a practical matter anti-stereotyping regulations apart from those respecting abusive programming could not be drawn in such a way as to effectively distinguish between undesirable stereotyping and political speech or art. The two may be inextricably intertwined. The danger from a constitutional and public policy point of view is that the degree of intrusion will be excessive in relation to the equality interest which it seeks to serve.

Chapter V Recommendations

The issues raised by minority stereotyping in broadcasting come at the intersection of two important and legitimate but competing interests. On one hand, vigorous debate on the issues of the day is, as stated by Duff C.J. in Alberta Press, the "breath of life" of our parliamentary institutions. We must therefore strive to restrict limitations on debate to a bare minimum and ensure that even those limitations are precise and easily understood. On the other hand, equality of opportunity and access for all members of society without regard to race, national or ethnic origin, colour, religion, sex, age or mental or physical disability is a cornerstone of the Canadian system and is enshrined in sections 15 and 28 of the Charter of Rights. These competing interests must be balanced very carefully.

I intend in this chapter to set forth my conclusions in the form of propositions on the effect of the enactment of the proposed sections 3(c.1) and 16(1)(b)(i) of the Broadcasting Act, together with legal and policy recommendations for the implementation of the objectives expressed in those sections.

1. It is submitted the proposed amendments to the Broadcasting Act in Bill C-20, that is, sections 3(c.1) and 16(1)(b)(i), will not substantially alter the basic statutory and regulatory framework for CRTC control of broadcast content.

(a) The CRTC is, at present, empowered by sections 3, 16 and 17 of the Act to regulate standards in broadcasting. The proposed section 3(c.1) particularizes one aspect of the high standard criterion in section 3(c), that is, the obligation of licensees to promote the equality and dignity of identifiable minorities in broadcasting.

(b) The CRTC is not authorized to enforce the high standards criterion by regulating individual program content either formally by way of regulation or informally pursuant to its power to impose conditions or refuse to renew licenses pursuant to section 17. It is submitted that the Commission has no jurisdiction to pre-screen programming for violations of broadcasting policy or to censure licensees post facto by refusing or threatening to refuse a license renewal application. The CRTC's jurisdiction is limited to promulgating an overall scheme of standards

which applies industry-wide to the full range of programming of each broadcaster. The proposed amendments do not endow the CRTC with any greater power to regulate content on a program-by-program basis.

(c) The abusive programming regulation is one step already taken by the CRTC to enforce high standards in broadcasting pursuant to sections 3 and 6 of the Act. The regulation prohibits programming abusive of the same minority groups enumerated in the proposed section 3(c.1). It is submitted that the regulation creates standards applicable industry-wide and is thereby within the Commission's statutory jurisdiction. If enacted, the proposed amendment will confirm in more precise terms the CRTC's authority to pass the abusive programming regulation as a means to ensure high standards by promoting equality. The amendment will make it clear that this authority extends to more subtle forms of discrimination, such as non-abusive stereotyping, as well.

(d) Another measure taken by the CRTC to enforce high standards in broadcasting is the implementation of the voluntary guide-lines created by the Task Force on Sex-Role Stereotyping. These guidelines

embody a myriad of proscriptions and requirements with regard to the portrayal of the sexes in broadcasting. Although they create standards which apply industry-wide, many of the guidelines, by definition, seem to be enforceable on a program-by-program basis. To the extent that these guidelines or any other regulations on stereotyping are enforced on a program-by-program basis, instead of applied to the entire range of a licensees programming, they are outside the CRTC's jurisdiction both under s. 3(c) of the Broadcasting Act and even under the proposed section 3(c.1).

2. It is submitted that any scheme to enforce the equality objectives expressed in the proposed section 3(c.1) must fall within the purview of the Canadian Charter of Rights and Freedoms. As a government-imposed restriction on the right to freedom of expression enjoyed by broadcasters, such a scheme can only be constitutionally permissible if it meets the section 1 requirement that it be reasonable, prescribed by law and demonstrably justified in a free and democratic society.

3. The abusive programming regulation is the only example of a formal regulatory scheme presently in operation to enforce equality objectives. In my view, it meets the requirements of section 1 of the Charter and is therefore a constitutionally permissible restriction on freedom of expression.

(a) The regulation is reasonable in that it furthers a legitimate public policy to eliminate discrimination and, it is submitted, contains adequate standards to enable broadcasters to know with sufficient particularity what programming is or is not prohibited. Any other regulations passed pursuant to the proposed amendments in Bill C-20 would have to be drafted in similarly precise terms to encompass only a prescribed and clearly identifiable range of expression.

(b) The regulation is prescribed by law.

(c) The regulation is demonstrably justified in that it prohibits only programming which is abusive, the range of the proscription is narrow and focuses only on that speech which denigrates those categories protected by section 15 of the Charter. Given the importance of the countervailing equality interests at state it is submitted that the abusive programming

restriction is demonstrably justified in a free and democratic society. It is not excessive or out of proportion to the stated public policy objective.

(d) As a matter of policy, it is submitted that there are no adequate alternatives to banning this type of speech. A right of reply such as that provided by the American fairness rules or the BBG White Paper in Canada does not address important dangers of abusive expression: first, that abusive expression directed at historically victimized minorities such as blacks and Jews may lead in certain circumstances to violence and second, that in all cases, abusive expression attacks the dignity of the individual as well as the roots of our multi-cultural Canadian heritage.

(e) Whether or not such a restriction on freedom of expression would be constitutionally valid in the context of the print media, it is submitted that given the pervasiveness of the broadcast media, its potential intrusiveness in family life and accessibility to children, the abusive programming regulation can be justified in the particular context of broadcasting.

4. The only attempt made to date by the CRTC to regulate less extreme forms of stereotyping in broadcasting, is the implementation of a "voluntary" scheme to regulate sex-role stereotyping. It is submitted that either "voluntary" or formal regulation of non-abusive stereotyping are bad policy and constitute an impermissible restriction on freedom of expression under the Charter.

(a) The voluntary guidelines created by the Task Force on Sex-Role Stereotyping in Broadcasting have not been passed in regulation form under section 16 of the Broadcasting Act and are, therefore, not prescribed by law as required by section 1 of the Charter. It is submitted that the CRTC cannot then make license-renewal decisions under section 17 of the Broadcasting Act on the basis of broadcasters' fulfillment of their obligations under the guidelines. Any scheme created by the CRTC to implement the equality objectives in the proposed section 3(c.1) will have to be validly enacted as regulations under section 16 before it can be lawfully enforced.

(b) The sex-role stereotyping guidelines, even if passed in regulation form, present greater

difficulties as far as concerns the reasonableness and demonstrable justification elements of section 1 of the Charter. The restrictions and requirements are too broad, and, by their nature amorphous and vague. It is difficult to imagine any area of political, moral, artistic or commercial expression which would not be susceptible to the censor's knife if the guidelines were promulgated into regulations. This would be true of any regulations designed on this scale to ensure the promotion and respect for the equality of individuals and minority groups in society pursuant to the proposed section 3(c.1). The adverse impact on freedom of expression would cut across such a wide spectrum that in my submission, it would outweigh the benefits to equality, sexual or otherwise. Non-abusive stereotyping, it is submitted, is too broad a field for this kind of government regulation to be effective without being over-intrusive. This is an area where the law should hesitate to impose a heavy presence.

(c) Furthermore, it is submitted that a right of reply, such as already provided for by the

Canadian White Paper on Political and Controversial Broadcasting Policies constitutes a reasonable alternative which is less restrictive of free expression in the case of an editorial, documentary or news commentary. In my view, regulation of stereotyping in broadcasting should be limited to providing groups victimized by this type of programming with the opportunity to respond and educate the public.

(d) Otherwise, it is suggested that the battlefield where stereotyping should be fought is in education, where equality can be taught at an early age, and in the expenditure of government money to re-educate the public.

FOOTNOTES

1. R.S.C. 1970, C. B-11, as amended.

2. Radio (A.M.) Broadcasting Regulations, C.R.C. 1978, c. 379, as amended; Radio (F.M.) Broadcastcasting Regulations, C.R.C. 1978, c. 380, as amended; Television Broadcasting Regulations, C.R.C. 1978, c. 381, as amended.

3. Canadian Charter of Rights and Freedoms, Canada Act, 1982, c. 11 (U.K.), Appendix B, (Constitutional Act, 1982), Part I, ss. 1-34.

4. CRTC Public Notice 1983-187: Concerning a Complaint Against CKVU Television, Vancouver, British Columbia by Media Watch, Ottawa, August 17, 1983.

5. R. v. Keegstra, unreported decision of the Alberta Supreme Court, November 5, 1984, Quigley J. (Since reported (1984), 14 W.C.B. 112 (Alta Q.B.))

6. Canadian Human Rights Commission v. John Ross Taylor, unreported decision of the Federal Court of Canada (Trial Division), December 20, 1984, Jerome A.C.J. (Since reported (1984), 29 A.C.W.S. (2d) 430 (F.C.T.D.))

7. Section 3(a) provides that the Canadian broadcasting system comprises all the public and private broadcasting undertakings in Canada.

8. The majority of the Supreme Court of Canada in CKOY Ltd. v. The Queen (1978), 90 D.L.R. (3d) 1 at 10 per Spence J. defined "programming" as the total process of gathering, assembling and putting out the programs generally. It did not specifically discuss the meaning of "high standard" but, on the facts of the case, the regulation was one which applied generally to the industry and was not intended to allow censorship of individual program content. The unsuccessfully impugned regulation (Radio (A.M.) Broadcasting Regulations, SOR/64-49, s. 5(1)(k), as amended by SOR/65-519, s. 1; SOR/70256, s. 3) broadcasting a telephone interview to obtain the consent of the interviewee. Although this regulation is content-based in that it operates as a prior restraint on speech, it is content neutral.

Therefore the case did not touch the issue of individual program censorship. The Supreme Court has not yet been faced with the issue of CRTC authority to require or prohibit the transmission of particular messages on the basis of their content.

9. [1971] F.C. 498. For a general criticism of the decision, see McCormick, "Censorship and the CRTC: the limits of 'generally applicable regulations' and the implications of the National Indian Brotherhood Case", paper submitted for Communications Law I, University of Toronto, Faculty of Law, January 1979, reproduced in Communications Law I Casebook, vol. 11 (1983) at VIII-14. Note that Mr. Justice Walsh failed to even consider the CRTC Television Broadcasting Regulations, C.R.C. 1978, c. 381, s. 6(1)(b) which even at that time prohibited programming abusive of any race, religion or creed (see also Radio (A.M.) Broadcasting Regulations, C.R.C. 1978, c. 379, s. 5(1)(b) and Radio (F.M.) Broadcasting Regulations, C.R.C. 1978, c. 380, s. 6(1)(b). Surely a hearing to determine if this regulation had been violated would have been in the public interest.

10. Ibid at p. 513.

11. (1982), 41 N.R. 271. See discussion in Grant, "Regulation of Program Content in Canadian Television: An Introduction, (1968) 11 Can. Pub. Admin. 322 at 367-368.

12. CRTC Public Announcement, Ottawa, July 9, 1970, Report by the Special Committee appointed in connection with the CBC program 'Air of Death'.

13. The counterpart to this provision in the Television Regulations includes "creed" as one of the prohibited categories. Television Broadcasting Regulations, C.R.C. 1978, c. 381, s. 6(1)(b).

14. The counterpart to this provision in the Television Regulations prohibits any obscene, indecent or profane "pictorial presentation", as well as language. Television Broadcasting Regulations, C.R.C. 1978, c. 381, s. 6(1)(c).

15. Radio (A.M.) Broadcasting Regulations, C.R.C. 1978, c. 379, s. 5(1)(b) as am. by SOR/84-786; Radio (F.M.) Broadcasting Regulations, C.R.C. 1978, c. 380,

s. 6(1)(b), as am. by SOR/84-787; Television Broadcasting Regulations, C.R.C. 1978, c. 381, s. 6(1)(b) as am. by SOR/84-788.

16. For example, Libel and Slander Act, R.S.O. 1980, c. 237, s. 2.

17. s. 159 C.C.

18. ss. 281.1, 281.2 C.C.

19. ss. 261 et seq C.C.

20. ss. 60, 51, 62 C.C.

21. s. 260 C.C.

22. Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 12 and 13(1), as am. by S.C. 1980-81-82-83, c. 143, s. 6.

23. s. 281.2(7) C.C.

24. ss. 281.2(7), 281.1(4) C.C.

25. Sections 262(1) and 263(c) C.C. use the singular "person". Note also the various defences, particularly those listed in ss. 273 and 274 C.C.

26. Supra note 22.

27. Human Rights Code, S.O. 1981, c. 53.

28. The old Ontario Human Rights Code, R.S.O. 1980, c. 340, s. 1, prohibited discriminatory publications. However, s. 1(2) gave priority to the expression of opinion.

29. Supra footnote 14.

30. Lynne McDonald, the New Democrat Party justice critic who had served on the Government Task Force on Sex-Role Stereotyping in Broadcasting, initiated a private member's bill in March 1983 to extend the prohibition in s-s. (1)(b) to sexually abusive programming. The bill was in response to the controversy over First Choice pay-TV's proposal to air programming produced by Playboy Enterprises, Inc. See The Globe and Mail (Toronto), Thursday October 6, 1983. It was withdrawn by agreement for further study by the House of Commons Communications and Cultural Committee.

31. Circular 51, December 15, 1961. Effective January 1, 1962.

32. See Morris, "The CHNS Case: An Emerging Fairness Doctrine for Canada?", (1972) 4 Can. Com. L.R. 1 at 29.

33. Morris, id. The White Paper has, for example, been incorporated into the CBC's internal program policies.

34. The principle that freedom of speech is a public right echoes the view expressed in Re Alberta Statutes, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 by Cannon J. and in Re New Brunswick Broadcasting Co. Ltd. and CRTC (1984), 13 D.L.R. (4th) 77.

35. CRTC Public Announcement, Ottawa, July 9, 1970, Report by the Special Committee appointed in connection with the CBC program 'Air of Death'.

36. CRTC Public Announcement, Ottawa, March 28, 1972, concerning an inquiry by the CRTC into a complaint against Radio Station CHNS, Halifax by the Halifax-Dartmouth Committee of Miles for Millions.

37. This goes beyond the American fairness rules which require the licensee to supply the person attacked with a script of the program and an offer of a reasonable chance to respond within a week following the broadcast 47 C.F.R., ss. 73.1920, 73.1930 (1982).

38. CRTC Public Announcement, May 27, 1964: Sexual Topics on Open Line Programs, Circular No. 103, reproduced in Jewett, "Censorship of Movies for Canadian Television", (1971) 3 Can. Com. L.R. 1 at 16, n. 79.

39. See McCormick, supra note 9 at VIII - 34.

40. Id.

41. CRTC Public Announcement, Ottawa, February 24, 1977, "Controversial Programming in the Canadian Broadcast System - Report on Issues Raised by CFCF's Anti-Bill 22 Campaign".

42. CRTC Public Notice 1983-187, supra note 4.

43. "Images of Women", Report of the Task Force on Sex-Role Stereotyping in The Broadcast Media, Minister of Supply and Services Canada, 1982.

44. SC. 1970-71-72, c. 38, as am. by 1983-84, c. 40, s. 64.

45. For a detailed account of the history of radio and television broadcasting in the United States, see Barnouw, The Image Empire, A History of Broadcasting in the United States From 1953 (1970); Barnouw, A Tower in Babel: A History of Broadcasting in the United States to 1933 (1966); Coase, "The Federal Communications Commission" (1959), 2 J.L. & Econ. 1. See Parkman, "The FCC's Allocation of Television Licenses: Regulation With Inadequate Information" (1981), 46 Alb. L. Rev. 22 at 25, n. 11.

46. 36 Stat. 629. The Act required, inter alia, any passenger vessels to be equipped with efficient radio apparatus.

47. Ch. 287, 37 Stat. 302 (1912), rep. by Act of June 19, 1934, Ch. 652, s. 602(a), 48 Stat. 1102.

48. 833.3 and 618.6 Kc.

49. See Coyne "The Future of Content Regulation in Broadcasting" (1981), 69 Calif. L. Rev. 555 at 585, n. 235.

50. 750 Kc.

51. 52 App. D.C. 339, 286 F. 1003 (D.C. Cir. 1923). The Secretary's duty in issuing licenses was held to be ministerial only; he could not refuse a license to a legally qualified applicant.

52. The assigned frequencies ranged from 550 to 1500 Kc. which amounted to 96 channels.

53. 12 F. 2d 614 (N.D. Ill. 1926).

54. Ch. 169, 44 Stat. 1162 (1927), rep. by 48 Stat. 1102 (1934).

55. Ch. 652, 48 Stat. 1064 (1934), 47 U.S.C., ss. 151-609 (1976 & Supp. II 1978).

56. 319 U.S. 190 (1943).

57. Id. at 227.

58. European Convention on Human Rights, Collected Texts Strasbourg (1979):

> 1...
> This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

59. Supra footnote 56 at p. 216.

60. S. 29, 44 Stat. 1172; See 47 U.S.C., s. 326 (1970).

61. 47 U.S.C., ss. 307(a)(d), 309(a), 310, 312.

62. See Lipsky, "Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation" (1976), 28 Stan. L.R. 225 at 565-66, n. 12.

63. United Broadcasting Co., 10 F.C.C. 515, 517 (1945); Mayflower Broadcasting Co., 8 F.C.C. 333, 340 (1940); Federal Radio Commission: Great Lakes Broadcastin Co., 3 F.R.C. Ann. Rep. 32, 33 (1928-29); WEVD, 2 F.R.C. Ann. Rep. 154, 155 (1928).

64. 13 F.C.C. 1246 (1949)

> ...we have recognized... the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.
>
> ...
>
> This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions... This duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the

> community served, and to make sufficient time available for full discussion thereof... In the presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. (emphasis added)

65. Pub. L. No. 86-274, 73 Stat. 557 (1959).

66. 47 U.S.C., s. 315(a) (1976). The full text reads as follows:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any-
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

67. See Coyne, supra note 49 at 561-62.

68. Editorializing by Broadcast Licensees, supra note 64 at 69. This balance may be achieved over a reasonable period of time. Robinson, "The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation" (1967), 52 Minn. L. Rev. 67, 134. Balance is nevertheless the responsibility of the individual licensee. He cannot rely on other stations to provide the required balance. Fairness Doctrine Primer, 40 F.C.C. 598, 606 (1964).

69. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 at 382.

70. Id. at 399 and 400.

71. 47 C.F.R., ss. 73.1920 (1979), 73. 1930 (1982).

72. See Coyne, supra note 49 at 564. See also Larus & Brother Co. v. FCC, 447 F. 2d 876, 882 (4th Cir. 1971). But see American Sec. Council Educ. Found. v. FCC, 607 F. 2d 438, 443 n. 13 (D.C. Cir. 1979).

73. Fairness Doctrine Primer, supra note 68 at 605.

74. Fairness Report, 48 F.C.C. 2d 1, 15 (1974).

75. Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963). In CBS v. Democratic National Committee, 412 U.S. 94 (1973), the United States Supreme Court held that the First Amendment does not require a general public right of access to the broadcast media, although it has held previously that Congress may create rights of access. Red Lion Broadcasting Co. v. FCC, supra note 74; NBC v. U.S., supra note 61. With the passage of s. 47 U.S.C., s. 312(a)(7), individual candidates seeking federal office now have an affirmative right of access to broadcast facilities. The constitutionality of this right of access was upheld in CBC v. FCC, 101 S. Ct. 2813 (1981).

76. Fairness Report, supra note 74 at 13-14.

77. Cullman Broadcasting Co., supra note 75; Red Lion, supra note 69 at 377.

78. The fairness doctrine does not require "equal time", but rather a rough equality in presenting the other side. See Stanley, "Federal Communications Law and Women's Rights: Women in the Wasteland Fight Back" (1971), 23 Hastings L.J. 15 at 51.

79. Editorializing by Broadcast Licensees, supra note 64 at 1251.

80. Id. at 1251-52.

81. Fairness Doctrine Primer, supra note 68 at 599. For more discussion of the fairness rules, see Morris, supra note 32 at 10-11.

82. 2d Fairness Report, 58 F.C.C. 2d 691, 710 (1976).

83. See Brandywine-Main Line Radio, Inc., v. FCC, 473 F. 2d 16 (D.C. Cir. 1972). In that case, misrepresentations by the licensee gave separate cause for the denial of the licensee's renewal application.

84. For a more detailed discussion of the fairness doctrine and personal attack rules, see, generally, Coyne, supra note 49 at 561-65.

85. Cigarettes: WCBS-TV, 8 F.C.C. 2d 381, 9 P. & F. Radio Reg. 2d 1423 (1967). See also "Applicability of the Fairness Doctrine to Cigarette Advertising", 9 F.C.C. 2d 921, 11 P. & F. Radio Reg. 2d 1901 (1967).

86. 405 F. 2d 1082 (D.C. Cir. 1968), cert. denied ABC v. FCC, 396 U.S. 842 (1969).

87. Friends of the Earth v. FCC, 449 F. 2d 1164, reviewing 24 F.C.C. 2d 743, 19 P. & F. Radio Reg. 2d 994 (1970).

88. 436 F. 2d 248, 258, 259, (D.C. Cir. 1970).

89. Id. at 256. See Stanley supra note 79 at 47.

90. Fairness Report 48 F.C.C. 2d 1 (1974), aff'd: National Citizens Comm. for Broadcasting v. FCC, 567 F. 2d 1095 (1977), cert. denied 436 U.S. 926.

91. Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d. 650 (1971), am. by Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976).

92. Federal Communications Commission, Public Service Responsibility of Broadcast Licensees (1946).

93. See Weissman, "The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs" (1981), 16 Colum. J.L. & Soc. Prob. 561 at 562 n. 9.

94. Id. at 562-64.

95. Id. at 565-66.

96. Examples of annual community problems submitted by licensees include: "Health Care and Safety, Women's Issues, Problems of Minority Groups". See Weissman's example of the list submitted by WABC-TV in New York City for 1978, id. at 567.

97. Stone v. FCC, 466 F. 2d 316, 328 (D.C. Cir. 1972).

98. Flower City Television Corp., 57 F.C.C. 2d 112, 116 (1975). CF. Leflore Broadcasting Co. Inc., 65 F.C.C. 2d 556 (1977), Newhouse Broadcast Corp., 59 F.C.C. 2d 218, 224 (1976).

99. Deregulation of Radio, 46 Fed. Reg. 13, 888 (1981). See Notice of Inquiry and Proposed Rulemaking, Deregulation of Radio, 733 F.C.C. 2d 457 (1979) (Notice) (Joint Appendix (JA) 195), approved in Office of Communication of the United Church of Christ v. FCC, 707 F. 2d 1413 (1983).

100. See Weissman, supra note 93 at 587-89.

101. For further discussion of the Ascertainment Doctrine see Weissman, id. and Stanley, supra note 78 at 21-36.

102. The Wireless Telegraph Act, 1905, S.C. 4 & 5 Edw. 7, c. 49.

103. Telegraphs Act, R.S.C. 1906, c. 126, as amended.

104. See discussion in Babe, "Canadian Television Broadcasting Structure, Performance and Regulations", Economic Council of Canada, 1979, c. 2, reproduced in Communications Law I casebook, vol. 1 (1983), compiled by Janisch, University of Toronto, at I-19.

105. Id. at I-19.

106. The Committee favoured the creation of a national, publicly owned network under the aegis, not of a Crown corporation, but of a Commission which would

operate on the basis of advertising and license fees. It recommended that private stations continue, but under the regulation of the public entity, with the prospect of an eventual take-over of the private stations by the public network.

107. The Canadian Radio Broadcasting Act, 1932, 22-23 Geo. V., c. 51.

108. Morris, supra note 30 at 24.

109. "Statement of Policy with Respect to Controversial Broadcasting", July 8, 1939, at 1, quoted in Baum, "Controversial Broadcasting in Canada", (1970), 8 Osgoode Hall L.J. 159 at 164; Morris, supra note 35 at 23.

110. Babe, supra note 104 at I-22.

111. Supra note 1.

112. Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c. 49.

113. Supra note 109.

114. Supra, note 31.

115. Morris, supra, note 32 at 28.

116. Minutes of Proceedings and Evidence, Special Committee on Broadcasting, House of Commons, Fourth Session, 24th Parliament, 1960-61, as reproduced in Baum, supra note 109 at 163.

117. Transcript of Juneau's remarks to the 1972 CAB Annual Meeting, reproduced as Appendix B to the article by Morris, supra note 32 at 48.

118. Supra note 35.

119. Supra note 36.

120. See Morris, supra note 32 at 32-35.

121. See Fowler and Brenner, "A Marketplace Approach to Broadcast Regulation" (1982), 60 Tex. L. Rev. 207 at 213-30.

122. Carroll Broadcasting Co. v. FCC, 258 F. 2d 440 (D.C. Cir. 1958).

123. NBC v. U.S., supra note 56 at 226.

124. Id.

125. Pursuant to these regulations, no license could be granted or renewed for stations involved in chain - broadcasting.

126. See Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F. 2d. 993 (D.C. Cir.), cert. dismissed, 281 U.S. 706 (1930).

127. Supra, note 69.

128. Supra, note 71.

129. Supra note 69 at 399-401.

130. Id. at 390 (citation omitted). For further discussion, see Barrow, "The Fairness Doctrine: A Double Standard for Electronic and Print Media", (1979) 26 Hastings L.J. 659 at 669; Coyne, supra note 54 at 576-77, Bazelon, "The First Amendment and the "New Media"- New Directions in Regulating Telecommunications" (1979), 31 Fed. Comm. L.J. 201 at 203-5.

131. In Canada, see Morris, supra note 32 at 36.

132. Supra, note 75.

133. 47 U.S.C., s. 312(a)(7). See supra note 75.

134. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) where editorial discretion in the print media was held to be immune from legislation which granted a right of reply to a political candidate whose character or record had been attacked in a Florida newspaper. There is no general public right of access to the broadcast media created by the Fairness Doctrine. CBS v. Democratic National Committee, supra note 75.

135. 104 S. Ct. 3106 (1984).

136. 47 U.S.C., ss. 390-399 (Supp. V. 1981).

137. For a more detailed analysis of the case, see "The Supreme Court, 1983 Term" (1984), 98 Harv. L. Rev., vol. 1 at 205-16.

138. Supra, note 134 at 3116.

139. See "The Supreme Court, 1983 Term", supra note 136 at 214, n. 56.

140. For more detail on spectrum-saving techniques see Fowler and Brenner, supra note 121 at 212 n. 23 and 222 n. 70.

141. The World Administrative Radio Conference has advocated this change. Id. at 222, n. 70.

142. Id. at 222, n. 71.

143. Id. at 223, n. 73; See "Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System", 47 Fed. Reg. 21, 468 (1982).

144. Fowler and Brenner, id. at 223 n. 74. See 4 C.F.R., s. 73.37 (1981).

145. Id. at 223 n. 75. See 78 F.C.C. 2d. 1232 (1980).

146. Lipsky, supra note 62 at 575, describes as "intensive" spectrum use which places more stations on the same range of frequencies. It has been argued that the scarcity of airwaves is a product of the way that the broadcasting industry has been structured, in particular, the system of granting free licenses, and that spectrum charges would have resulted in a more efficient use of the spectrum. See Ithiel de Sola Pool, Technologies of Freedom (1983) at 149-50 and 231.

147. Fowler and Brenner, supra note 121 at 223-25.

148. It is expected that it will eventually be feasible to launch satellites capable of relaying 100,000 voice circuits or 100 television channels. See Coyne, supra note 49 at 578, n. 181.

149. Fowler and Brenner, supra note 121 at 225, n. 84.

150. Re Alberta Statutes, supra note 34 at S.C.R. 133 and D.L.R. 107.

151. Emerson, "Legal Foundations of the Right to Know" in "The First Amendment and the Right to Know", 1976 Wash. U.L.Q. 1, 12-13.

152. Emerson, The System of Free Expression, (1970) at 662-71. See Coyne, supra note 49 at 577-78, n. 177 and Fowler and Brenner, supra note 121 at 225, n. 83.

153. Coyne, supra note 49 at 577, n. 177. See Bollinger, "Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media" (1976), 75 Mich. L. Rev. 1, 15. In fact the number of radio stations exceeds the number of newspapers, although the discrepancy appears far less dramatic when one considers the entire breadth of the print media including magazines, books and fliers which compete with newspapers, albeit less powerfully, in the marketplace of ideas.

154. See the speech of then Secretary of State Judy LaMarsh at the time the Act was introduced in Parliament in Canadian House of Commons Debates, Nov. 1, 1967, at 3747, cited in Morris, supra note 32 at 19.

155. CRTC Policy Statement on Canadian Content in Television, Notice 83-18, January 31, 1983.

156. See Fowler and Brenner, supra note 121 at 226-27.

157. Supra note 69 at 400.

158. NBC v. U.S. 418 U.S. at 173-74, cited in Coyne, supra note 49 at 582 n. 211.

159. Supra note 34.

160. Id. at 88-89.

161. Coyne, supra note 49 at 583.

162. Emerson, supra note 151 at 660; Kunz v. New York, 340 U.S. 290, 293-94 (1951). Coyne, supra note 49 at 583 also makes an analogy between the spectrum and the postal service as another means of disseminating speech which is owned by the public but is nonetheless not subject to government control of content. I think there is a distinction, however, in that although the postal service is publicly owned, the speech involved is mostly private in nature as opposed to the public character of speech broadcast on the airwaves.

163. Robinson, supra note 68 at 152-53.

164. See Coyne, supra note 49 at 580-81; Bazelon, supra note 130 at 207-8.

165. Id. See Bazelon, "FCC Regulation of the Telecommunications Press", 1975 Duke L.J. 213, 221 and Schneyer, "An Overview of Public Interest Law Activity in the Communications Field", 1977 Wis. L. Rev. 619, 653.

166. See Jewett, supra note 38 at 4.

167. Supra, note 86.

168. 98 S. Ct. 3026, 438 U.S. 726 (1978). See discussion of Pacifica by Evans, "An Examination of the Theories Justifying Content Regulation of the Electronic Media" (1979), 30 Syracuse L. Rev. 871.

169. FCC v. Pacifica Foundation, id. at 3040.

170. Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access" (1972), 85 Harv. L. Rev. 768 at 769 and 787.

171. Coyne, supra note 49 at 581, n. 202.

172. Fowler and Brenner, supra note 121 at 228.

173. Coyne, supra note 49 at 582.

174. eg. Montreal, Winnipeg, Ottawa, Moncton.

175. As observed in (1981), 95 Harv. L.R. 221 at 228 n. 39, it is odd that a candidate for Congress from the District of Columbia, for example, has access to several television and radio stations but none to the city's only newspaper.

176. Supra note 134.

177. [1979] 2 S.C.R. 435.

178. Fowler and Brenner, supra note 121 at 228-29.

179. Supra note 168 at 3049.

180. See quotation at 8‡ text, supra.

181. Supra, note 168 at 3044 and 3046.

182. I have only American statistics for this proposition. Senator Proxnire reported the results of a Roper Poll according to which 67% of the American public looked to television as the major source of news and commentary, as opposed to 20% for radio and 49% for newspaper, including multiple choices. Proposed Amendments to the Communications Act of 1934: Hearings on s. 611 and s. 622 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 96th Cong. 1st Sess. 2628-29 (1979) at 2628. I would conclude, nevertheless that similar statistics must apply in Canada since there are no obvious differences between the viewing audiences of Canada and the United States.

183. Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 225 at 240.

184. Re Soenen and Thomas (1983), 3 D.L.R. (4th) 658 at 667.

185. The phrase "other media of communication" undoubtedly includes broadcasting.

186. (1983), 41 O.R. (2d) 583.

187. Theatres Act, R.S.O. 1980, c. 498.

188. Supra note 186 at 590.

189. Id. at 591.

190. (1984), 45 O.R. (2d) 80.

191. (1984), 48 O.R. (2d) 395.

192. Id. at 430-31

193. (1984), 48 O.R. (2d) 123.

194. Id. at 127.

195. Re Koumoudouros and Municipality of Metropolitan Toronto (1984), 45 O.R. (2d) 426.

196. See also Information Retailers Assoc. v. Municipality of Metropolitan Toronto, unreported decision of the Ontario Court of Appeal, October 17, 1985, Robins, J.A. (Houlden, Cory and Robins, JJ.A.) and Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise (1985), 57 N.R. 386 (Fed. C.A.)

197. See Re Soenen and Thomas, supra note 184.

198. 316 U.S. 53 (1942).

199. 421 U.S. 809 (1975).

200. Id. at 821 per Blackmun J.

201. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

202. In Virginia State Board of Pharmacy, the restriction was overly broad, leaving open only word of mouth as a means to pass the information, and was not closely related to a significant state interest. A significant state interest would be, for example, the regulation of misleading or false advertising.

203. [1982] 2 S.C.R. 307, 137 D.L.R. (3d). See discussion in Finkelstein, "Section 1: The Standard for Assessing Restrictive Government Action and the Charter's Code of Procedure and Evidence" (1983), 9 Queen's L.J. 143 at 196. In the United States on the same point, see Bates v. State Bar of Arizona, 433 U.S. 350 (1977). For the relevance of pre-Charter cases generally, see Finkelstein, "The Relevance of Pre-Charter Case Law for Post-Charter Adjudication", (1982) 4 S.C.L.R. 267 at 272.

204. (1985), 50 O.R. (2d) 118.

205. Supra note 186 at 591.

206. See text at 94-96, supra.

207. Beckton, See "Freedom of Expression", in Beaudoin & Tarnopolsky, eds., Canadian Charter of Rights and Freedoms: Commentary, (1982) 75 at 95, 100-101.

208. Supra, note 58.

209. Id. at 908.

210. European Court of Human Rights, The Sunday Times Case, 1979, Judgment, at 40.

211. R. v. Oakes (1982), 40 O.R. (2d) 660 (C.A.); Re Skapinker (1983), 40 O.R. (2d) 481, rev'd on other grounds, [1984] 1 S.C.R. 357. See also Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d)

255; Quebec Association of Protestant School Boards v. A.G. Que. (1983), 140 D.L.R. (3d) 19, aff'd 20 A.C.W.S. (2d) 409 (Q.C.A.)., aff'd (1984), 10 D.L.R. (4th) 321 (S.C.C.); Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, supra notes 186 and 190.

212. Quebec Association of Protestant School Boards v. A.G. Que., id.

213. Supra note 186 at 592.

214. One example should illustrate the problem inherent in saying that an exercise of discretion may not be prescribed by law notwithstanding that it is legislatively authorized. Labour boards are granted very wide discretionary powers. Furthermore, they are protected by privative clauses which may shield even errors of law unless they are patently unreasonable. Teamsters Local Union 938 v. Massicotte (1982), 135 D.L.R. (3d) 385 (S.C.C.); Canadian Union of Public Employees v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227. There are good policy reasons for this. Yet, if these decisions are not "prescribed by law" due to the breadth of the discretion conferred, the entire labour relations regulatory system will founder notwithstanding that it is both reasonable and demonstrably justified in a contemporary democratic society. The heart of the problem where broad discretion is conferred is not whether decisions made pursuant to it are "law", but rather whether the empowering legislation itself is constitutional.

215. See Saumur v. Quebec, [1953] 2 S.C.R. 299 where a majority of the Supreme Court of Canada struck down a by-law passed by the City of Quebec which forbade the distribution of any literature on the public streets without the written permission of the Chief of Police. The majority of the Court rejected the minority position that the by-law related to the administration of streets, and held that because permission to distribute such literature could be withheld on the basis of the content of the material and thereby used as a vehicle to control public messages, the by-law should be classified as in relation to either speech or religion. Thus, the case established, inter alia, that the courts will examine legislation to determine whether, regardless of the actual language or purpose of the law, its

effect or mode of administration is to violate one or more fundamental liberties. Similarly, in Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662. Laskin C.J., dissenting, held that a statute which delegated wide censorship powers to a provincial board was not in relation to property in the province but rather a matter of criminal law. The board could exercise its powers without regard to any statutory standards and could make its decision to grant or refuse a film exhibition license on political, religious, social or moral grounds.

216. Supra note 196

217. Id. at 36

218. Id. at 36-37

219. Supra note 196

220. R.S.C. c. C-41, S. 14 and Sch. C, Tariff item 99201-1

221. Supra note 196

222. See note 247, infra.

223. Re Alberta Statutes, supra note 34 per Duff C.J. at S.C.R. 133 and D.L.R. 107:

> "The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and those conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned".

224. Supra note 215, per Rand J.

225. Switzman v. Elbling, [1957] S.C.R. 285

226. [1945] 0.R. 778 (H.C.)

227. [1948] 0.R. 579 (C.A.)

228. (1980), 120 D.L.R. (3d) 590.

229. [1981] S.C.R. 818, 124 D.L.R. (3d) 193.

230. The classic American test is formulated in Shelton v. Tucker, 364 U.S. 479 (1960) at 488:

> [E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by a means that broadly stifles fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

See Finkelstein, "Section 1: The Standard for Assessing Restrictive Government Action and the Charter's Code of Procedure and Evidence", supra, note 203 at 187.

231. For example, the Minister has the power, in s. 17(3), to review conditions attached to the license of the CBC. The issue, amendment or renewal of any broadcasting license may be reviewed by the Governor in Council pursuant to s. 23. In addition, the governor in Council may issue directions to licensees to broadcast urgent programs, under s. 18(2), and to the Commission with respect to the issuing of licenses, under s. 22(1).

232. s. 281.2(2) C.C.

233. S.C. 1976-77, c. 33, s. 13, as am. by S.C. 1980-81-82-83, c. 143, s. 6.

234. For example, Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 5, 6, 7, 9, 10, 11; Human Rights Code, S.O. 1981, c. 53 ss. 1, 2, 3, 4, 5, 6. In the United States, for evidence of public policy against sex-role stereotyping see Frontiero et Vir. v. Richardson, Secretary of Defence, 411 U.S. 677 (1973) at 684 and the list of legislative enactments by Congress at 687, n. 21 of the case. See also Weinberger, Secretary of Health, Education and Welfare v. Wiensenfeld, 420 U.S. 636 (1975) and Taylor v. Louisiana, 419 U.S. 522 (1975).

235. The problems arising from this analysis have been explored in Part 1) of this chapter, and I would like to restate here my submission that the lack of legislative standards in that case went to the issue of reasonableness or justifiability of the legislation and not to legal prescription. See text at 106 supra and note 214, supra.

236. This is precisely the issue raised by the Ontario Film & Video case. The Divisional Court held that although the impugned provisions of the Theatres Act are of no force and effect insofar as they concern film censorship, they could be rendered operable by the promulgation of adequate regulations. The Court of Appeal in the same case appears to have taken the contrary position; it affirmed the Divisional Court's result but held section 3(2)(a) of the Theatres Act ultra vires rather than merely inoperative. The Court of Appeal's reasoning was that the section contained no limits at all, reasonable or otherwise. The implication is that statutory provisions which are too vague and overbroad cannot be bootstrapped into validity even by regulations which contain adequate standards.

It is submitted that the Divisional Court decision is preferrable. If the policy of sections 1 and 2(b) of the Charter is to keep limitations within narrow boundaries, regulations which do so should defuse any constitutional objections with respect to the empowering legislation. Section 16 as amended or not, could be revived to the extent that the abusive programming regulation itself meets the section 1 standards.

This was the approach taken by the Ontario Court of Appeal in the recent case of Information Retailers Association v. Municipality of Metropolitan Toronto, supra note 196 where a municipal by-law regulating the display and sale of adult literature was struck down as an unreasonable limitation on the Charter guarantee of freedom of expression. The by-law and amendments thereto were passed pursuant to section 222(9)(b) of the Municipal Act which authorizes municipal councils to pass by-laws regulating "adult entertainment parlours", that is any premises which, inter alia, provide goods, including books and magazines "appealing or designed to appeal to erotic or sexual appetites or inclinations". It should be noted that the by-law amendment which was struck down as too vague and overbroad was cast in the same terms as the authorizing legislation; Section 1(1a)(a) of By-law No. 107-78, as amended, defines adult books and magazines as material "appealing to or designed to appeal to sexual or erotic appetites or inclinations". Nevertheless, the court upheld section 222(9)(b) of the Municipal Act, expressly varying the orders of the Divisional Court which

declared it invalid as an unlawful intrusion upon the federal criminal law power. In fact, the Court expressed the view that there is no reason why a by-law could not be drawn properly to meet the required standards of specificity and proportionality with respect to the balancing of regulatory objectives against freedom of expression (Id. at 37-38). There was no suggestion that section 222(9)(b), though equally as vague and overbroad as the by-law in question, was ultra vires rather than merely inoperative insofar as the regulation of adult books and magazines is concerned.

237. Abusive is defined as:

> 1. abusing; mistreating
>
> 2. coarse and insulting in language; scurrilous; harshly scolding. (Webster's New World Dictionary of the American Language, (College ed. 1962) at 7.

"Hatred", defined as strong dislike or ill will (Id. at 663), and "contempt", defined as scorn, the feeling or actions of a person toward something he considers low, worthless, or beneath notice (Id. at 318), are words which quite clearly indicate the type of expression which is prohibited. In most instances, coarse and insulting language which engenders dislike, ill will or scorn for minorities by society as a whole can be easily identified.

238. Supra note 6.

239. Supra note 233.

240. (1985), 43 C.R. (3d) 318 (Alta. Q.B.).

241. Id. at 334.

242. [1962] S.C.R. 681 at 702: ... "I think that the new statutory definition does give the court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncracies and sensitivities of the tribunal of fact, whether judge or jury".

243. (1984), 14 C.C.C. (3d) 230 (Man. Q.B.).

244. (1984), 38 C.R. (3d) 275 (B.C. Co. Ct.), aff'g 6 C.C.C. (3d) 331.

245. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.).

246. Id. at 21.

247. In part 1) of Chapter IV, the issue of whether international agreements constitute a super-added element within the legal prescription requirement in section 1 is discussed. The better view is that those agreements which are unincorporated into domestic law cannot give rise to independent rights and cannot override validity enacted domestic law. See text at 111-12, supra. On this reasoning, it is unnecessary to consider whether the abusive programming regulation would be sanctioned by international law.

If such treaties are incorporated into the section 1 standard, however, then the regulation may not be "prescribed by law". Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights recognize that the right to freedom of expression may be validly subjected to restrictions necessary for the respect or protection of the rights or reputations of others. A reproduction of Art. 10 of the Convention is at 103 text, supra. Art. 19(3) of the Covenant is reproduced in Beckton, supra note 207, at 100. A broadcasting regulation designed to prevent abusive comments which engender hate or contempt for minority groups appears, on its face, to fall within this exception to the freedom of expression guarantee. One commentator, (Beckton, id. at 96-97) however, has expressed the opinion that the European Convention must be interpreted in light of the 1970 Declaration on Mass Communications Media and Human Rights, supra note 58, which expressly prohibits censorship of the contents of the print and broadcast media, except for the aims specified in the Convention, and in light of a 1974 resolution, supra note 208, which recommends that member states provide a right of reply to individuals whose reputations are affected by a printed report or broadcast, as well as a remedy for an unjustifiable invasion of privacy or an attack upon dignity, honour or reputation. Therefore, in the commentator's view, the right to reputation and privacy does not allow the state to censor or prevent directly the dissemination of

information, but merely permits a right of redress for affected individuals, notwithstanding the absence of any such limitation in the Convention itself. On this reasoning, a regulation which prohibits the broadcasting of abusive comments would not be sanctioned by the European Convention, and if the Convention is comprised by section 1, would not be a constitutional restriction on the right of free speech. As already stated in at 11[illegible] text, however, an otherwise validly enacted regulation such as the one concerning abusive programming probably cannot be attacked on the basis of restrictions found in an international convention and attendant resolutions which do not, as yet, form part of Canadian domestic law.

248. [1985] 3 W.W.R. 481 at 531 (S.C.C.).

249. 249 U.S. 47 (1919).

250. See Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrines; Some Fragments of History" (1975), 27 Stan. L.R. 719 at 724: Tribe, American Constitutional Law (1978) at 608-17.

251. 395 U.S. 444, 447 (1969).

252. See Comment, "Brandenburg v. Ohio: A Speech Test for All Seasons" (1975). 43 U. Chi. L. Rev. 151

253. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where the Court upheld the conviction for disorderly conduct of a Jehovah's Witness who called a city Marhsall a "damn fascist" and a "God damned rackateer".

254. Gooding v. Wilson, 405 U.S. 518 (1972); Terminiello v. Chicago, 337, U.S. 1 (1949), where the Court overturned the conviction of a defendant who made a racist speech and angered a crowd contrary to a statute prohibiting expression which "stirs the public to anger [or] invites dispute". It was held that the statute, in discouraging dispute and even anger among people, was overbroad and therefore void on its face; Cohen v. California, 403 U.S. 15 (1971) where the words "Fuck the Draft" sewn onto a jacket and worn into the Los Angeles County Courthouse were not held to be "fighting words" because they were not directed at any particular person and there was no evidence that they were about to incite groups of citizens to physical assault.

255. 343 U.S. 350 (1952).

256. 432 U.S. 43 (1977).

257. Collin v. Smith, 578 F. 2d 1197 (1978, 7th Cir.).

258. Smith v. Collin, 436 U.S. 953.

259. Supra note 5.

260. At this stage, Charter guarantees should be widely interpreted. See discussion at 98-105 text, supra.

261. S.C. 1960, c. 44; R.S.C. 1970, Appendix III

262. See Can., Report of the Special Committee on Hate Propoganda (1966) at 6.

263. Supra note 253 at 517. See also Frankfurter J.'s discussion in Beauharnais, supra note 255 at 257.

264. Supra note 5 at 30-31.

265. Supra note 6.

266. See text at 120-21, supra.

267. Supra note 6 at 6.

268. Id. at 9.

269. Supra note 240 at 336.

270. Supra note 245 at 8.

271. Id. at 22.

272. Id. at 23.

273. "Pornography and Prostitution in Canada", Report of the Special Committee on Pornography and Prostitution, Minister of Supply and Services Canada, 1985.

274. See discussion, id. at 95-103.

275. Id. at 99.

276. Id. at 24 and 103.

277. See text at 120-21 and 138-39.

278. See text at 128-38.

279. "Group Defamation", Patrick D. Lawlor, Report submitted to the Attorney General of Ontario, March 1984.

280. Id. at 5, 15-16, and 98.

281. Report of the Special Committee on Racial and Religious Hatred for the Canadian Bar Association, July, 1984.

282. Id. at 7.

283. Id. at 8.

284. Id. at 14.

285. Id. at 15.

286. The Task Force on Sex-Role Stereotyping in the Broadcast Media was first proposed by former Minister of the Department of Communications, the Honourable Jeanne Sauve, acting on an undertaking of the federal government in the National Plan of Action on the Status of Women. The Task Force comprised nineteen members: four representatives from the advertising industry, four from private broadcasting, one from the CBC, six representatives of the public interest and four CRTC Commissioners. Two representatives from the Canadian Advisory Council on the Status of Women served as ex-officio members during their tenure on the Council.

287. Supra, note 43.

288. Supra, note 4.

289. "Images of Women", supra note 43 at 4. See also Stanley, supra note 78 at 16. Stanley compares the modern media image of women to the portrayal of the black man in the 1960's. In the United States, sex is a "suspect" category, as is race, under the Fourteenth Amendment: Sail'er Inn, Inc. v. Kirby, 5 (1971). The same comparison is noted by Axelrad, "Ring Around the Collar-Chain around her Neck: A Proposal to Monitor Sex-Role Stereotyping in Television Advertising", (1976), 28 Hastings L.J. 149 at 151.

290. "Images of Women", supra note 43 at 4. A United Nations Report put it as follows:

> [T]he image of women in the family portrayal by advertisements reinforces sex-role stereo-types. It is acceptable for women to do the mending, washing and feeding, and men to do the handiwork or wash the car. Women are usually portrayed as unable to think for themselves and they invariably let the men make the decisions on the higher - priced purchases. Loss of masculine approval is viewed as a threat, and a women's actions or clever uses of the product are viewed so as to gain the man's approval and securely entrench the woman's place in his life. According to advertisements, women seem to be obsessed with cleanliness placing above-normal emphasis on whiteness, brightness and expressing a gamut of emotions at smelling the kitchen floor or the family wash.
>
> Commission on the Status of Women of the United Nations Economics and Social Council, Influence of Mass Communication Media on the Formation of a New Attitude Towards the Role of Women in Present-Day Society: Report of the Secretary General 15 (1974). See Axelrad, id. at 151.

291. One theory is that television has a "status-inferral" effect which imposes upon individuals or groups whatever status has been assigned by repetitive media coverage. Stereotypes of women in television further the tendency to restrict the social roles available to women by convincing the viewing audience that, for example, a women's place is in the home: Axelrad, id. at 152, n. 15. See also Stanley, supra note 78, at 17-18.

It is interesting to note that Axelrad at 153 calls on the FCC to make fair and equitable treatment of women in product advertising a component of each broadcast licensee's public interest obligation. He proposes that the FCC include an evaluation of the advertising industry's treatment of women at license renewal. It is also interesting to note that in the United States, as far back as 1971, N.O.W. (the National Organization for Women) began to monitor the broadcast media to identify and influence broadcasters.

292. Portrayal of Women in C.B.C. Programming --Policy Statement, "Images of Women", supra note 3, at 121.

293. C.B.C. Commercial Acceptance Policy Directive, 12 June 1980: CBC Standards of Good Taste, "Images of Women", Id. at 125.

294. Language Guidelines --- Portrayal of Women in CBC Programs, "Images of Women", Id. at 121.

295. Stereotypes in CBC Programming -- Policy, "Images of Women, Id. at 136.

296. See Appendix "B".

297. See Appendix "C".

298. CRTC Public Notice 1983-211: Implementation of Sex-Role Stereotyping Recommendations, Ottawa, September 16, 1983.

299. For a denunciation of the paternalism rationale in the political expression context, see Switzman v. Elbling, supra note 225 at 305 per Rand J.

300. For example, certain groups believe that a woman's primary roles are those of wife, mother and homemaker. However, according to "Images of Women", supra note 43 at XV, 50.3% of Canadian women no younger than 15 are working while 46.3% of married Canadian women have outside jobs.

301. Reality is that women are mostly confined to "women's" occupations like teaching and nursing etc. However it is public policy to promote women as performing the same range of occupations as men.

302. For the reasons expressed in part 2) of this chapter, any regulatory scheme adopted by the CRTC to eliminate minority stereotypes in programming would constitute government action which triggers the application of the Charter. It is also submitted that even a "voluntary" scheme such as that adopted by the broadcasting industry on the recommendation of the Task Force on Sex-Role Stereotyping must meet Charter standards. The issue has been formulated by the United States Supreme Court as follows:

> The question ... is simply whether the [Federal Communications] Commission, by announcing that it

> will refuse licenses to persons who engage in specified network practices ... is thereby denying such persons the constitutional right of free speech. (NBC v. U.S., supra note 56 at 226-27. See Axelrad, supra note 289 at 154.

Although instances of non-renewal are rare, this kind of subtle regulation is very potent. Broadcasters tend to conform to CRTC directives rather than put their valuable licenses in jeopardy. They seldom, as a matter of practice, challenge the legality of the CRTC's actions. As Laskin, C.J. observed in the McNeil case (supra note 215 at S.C.R. 682 and D.L.R. 16), one cannot deny that a licensee is liable to punishment when he may only disobey a policy order on risk of cancellation of his licence.

The power of informal regulation was recognized in the United States in Writers Guild of America West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976). See also Sonderling Broadcasting Corp. (WGLD-FM), 41 F.C.C. (2d) 777 (1973). The FCC had threatened to regulate violent and indecent broadcasting unless the industry adopted "voluntary" family viewing rules. Network executives were warned that the FCC would consider sexual and violent programming at license renewal time. As a result, the networks and the NAB adopted the FCC recommendations. The California Circuit District Court held that the FCC actions were unconstitutional (Writers Guild, id. at 1140. See discussion by Louis in "Broadcasting Offensive Programming Under a New Communications Act" (1980), 15 Colum. J.L. and Soc. Prob. 427 at 445-447. See also Ithiel de Sola Pool, supra note 146 at 135.). The decision was reversed on appeal (Writers Guild of America West, Inc. v. A.B.C., 609 F. 2d 355 (9th Cir. 1974), Cert. denied 440 U.S. 824), but the District Court's assumption that the threat of licence cancellation or non-renewal was prima facie a restriction on free speech which could attract judicial scrutiny was not questioned.

The Canadian situation with respect to sex-role stereotyping is very similar to the Writers Guild case. The CRTC Task Force was formed at the behest of the federal government and concluded its study with very detailed recommendations for industry self-regulation. These recommendations were "voluntarily" adopted in their entirety by the broadcasting and advertising industries and the

CRTC. The threat was implicit that if the Commission was dissatisfied at the end of the two year self-regulatory period, it would impose formal regulations with respect to sex-role stereotyping. Although that deadline has been pushed back, those stations which violate the guidelines risk the possibility that their licenses will not be renewed.

303. The authorities to date clearly indicate that the onus of justifying limitations on guaranteed rights rests with the state. See, for example, supra note 211.

304. See supra note 236.

305. "Images of Women", supra note 43 at 29-35.

306. Supra note 294 at 121-125.

307. ~~Appendix "B"~~. footnote deleted

308. ~~Appendix "C"~~. footnote deleted

309. It may be that guidelines which place a prior restraint on sex-role stereotyping also constitute too broad a restriction on speech to fall within the exceptions to freedom of expression found in the European Convention on Human Rights and the Declaration on Mass Communications Media. See note 247, supra.

310. Stanley, supra note 78 at 18, acknowledges that in the United States, sex-role stereotyping cannot be supressed entirely since this would amount to censorship and a violation of the First Amendment. The problem must be dealt with by demanding that the station present the other side of the issue.

311. ABC, Inc., 52 F.C.C. 2d 98 (1975); NBC, Inc. 52 F.C.C. 2d 273 (1975).

312. Supra note 99.